Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

BONNIE BRIAR SYNDICATE, INC.,

Petitioner,

v.

THE TOWN OF MAMARONECK, THE TOWN BOARD OF THE TOWN OF MAMARONECK, ELAINE PRICE, Supervisor, KATHY O'FLINN, PAUL RYAN, VALERIE O'KEEFFE, and BARRY WEPRIN, as Members of The Town Board,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals, State Of New York

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can a town constitutionally solve preexisting general municipal drainage and flooding problems (and satisfy desires for open space) by zoning one property owner's land to be a *de facto* catch basin for waters diverted from elsewhere in the town? Does that take the affected owner's property for public use without compensation by singling out the aggrieved landowner alone to bear community-wide burdens?

2. This Court has held that a 5th Amendment taking of property occurs when a land use regulation "fails to substantially advance legitimate state interests." What legal criteria determine whether such a regulation passes or fails that test? Specifically, is regulation that "substantially advance[s] legitimate state interests" synonymous with that which is merely "reasonable," as the court below held?

3. Can a municipality destroy a property owner's constitutionally protected "distinct investment-backed expectations" for using land simply by asserting that there is a *reasonable* relationship between its regulatory destruction of those expectations and its ostensible goal, where evidence would show that such destruction is not *necessary* to achieve the goal?

4. Can a land use regulation be declared valid *as a matter of law*, thus depriving the property owner of the right to a trial on the merits, when disputed facts underlie the municipality's assertion of a constitutionally valid connection between the regulation's means and its ostensible ends?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All parties are listed in the caption.

Bonnie Briar Syndicate, Inc. has neither parents nor subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Bonnie Briar Syndicate, Inc. respectfully prays that a Writ of Certiorari issue to review a final judgment and order of the New York Court of Appeals.

OPINIONS BELOW

The decision under review was filed on Nov. 23, 1999 and is reported as *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, 94 N.Y.2d 96, 699 N.Y.S.2d 721 (1999). (App., p. 1.) Two opinions by the Appellate Division of the Supreme Court were filed August 25, 1997 and December 7, 1998, and reported at 242 A.D.2d 356, 661 N.Y.S.2d 1005 (1997) and 256 A.D.2d 293, 681 N.Y.S.2d 329 (1998), respectively. (App., pp. 15 and 13.) The trial court's unreported decision was filed July 3, 1996. (App., p. 17.)

JURISDICTION

This case arises from the New York courts' refusal to follow this Court's decisions and their refusal to provide a remedy for this regulatory taking of property.

Because of its desire to use Bonnie Briar's property as (1) open space for the enjoyment of the Town's citizens, (2) recreation space for those who could obtain membership in the private golf club operated on the subject property, and (3) a natural storm water retention basin to protect the Town from flooding, the Town Board downzoned this property solely to recreational (almost exclusively golf course/open space) use. This destroyed the property owner's long-standing (dating back to 1922), distinct, investment-backed expectations of building some homes on the property, clustered in such a way that *the golf course would have been preserved*. The Town has

thus *de facto* imposed a public easement for a municipal resource, *de facto* conscripting Bonnie Briar as an involuntary provider of public open space and a storm water retention basin.

Bonnie Briar sued for violations of the 5th and 14th Amendments to the United States Constitution, 42 U.S.C. § 1983, and Article One, §§ 6 and 7 of the New York Constitution, in that the Town singled out Bonnie Briar to provide substantial and valuable benefits to the Town gratis, when they could have been provided without destroying Bonnie Briar's ability to construct housing on the land. The Town's actions were not "reasonably *necessary*" to achieve the governmental goals (see *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 127 [1978]; emphasis added), and violated the rule that a 5th Amendment taking occurs when a land use regulation fails to "substantially advance legitimate state interests." (*Agins v. City of Tiburon*, 447 U.S. 255, 260 [1980].)

The New York Court of Appeals ordered the complaint dismissed as a matter of law, without hearing evidence. It confusingly equated the "substantially advances legitimate state interests" standard with the merely "reasonable" standard (the latter a due process, not a takings, standard). Petitioner seeks Certiorari because that holding conflicts with numerous decisions of this Court, including *Penn Central* and *Agins*, as well as the recent decision in *City of Monterey v. Del Monte Dunes*, 119 S.Ct. 1624 (1999).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment, United States Constitution:

" . . . nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

"Section 1 . . . nor shall any State deprive any person of life, liberty, or property without due process of law; . . . "

Pertinent portions of State law are at App., pp. 31-37.

STATEMENT OF THE CASE

Bonnie Briar owns 150 acres of land in Mamaroneck, N.Y., that has been leased for use as a private golf course since 1921. Since 1922, this land (and all surrounding land) has been zoned for residential development. The surrounding land has been developed accordingly. The owners of the Bonnie Briar property have been pursuing a long-term plan to construct homes in conjunction with the golf course (as most American golf courses have done); golf courses offer unique enticements and increased value to prospective homebuyers and the surrounding communities. But, in 1994, the Town rezoned Bonnie Briar's land to restrict it to recreational use only – principally the existing golf course.[1]

This rezoning had nothing to do with any detriment that would be caused if Bonnie Briar were to complete its planned development by adding 71 homes, clustered at the center of the golf course. The Town Board conceded that it was accomplishing three municipal objectives.

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[1] Although the new ordinance itself does not, in those words, restrict the property to use as a golf course (merely "recreation"), it *de facto* eliminates the possibility of developing anything else by limiting additional lot coverage to a mere half-acre (R 608), thus eliminating any other economically productive use.

First, it was preserving "open space." Because surrounding landowners in Mamaroneck and neighboring municipalities had already developed their land with homes, the last remaining blocks of "open space" were in the Bonnie Briar property and another local golf course. For the enjoyment of its citizens, the Town board decided to keep that space open and undeveloped.[2]

Second, the Town Board said it wanted to preserve "recreational" opportunities for its residents, on the [fictional] hypothesis that *if* this property were *entirely* converted to homes, the golf course would be eliminated. But Bonnie Briar intended no such thing, and the golf course was private and open to members only; most of its members did not live in the Town.[3]

Third, the Town Board noted that low-lying parts of the subject property made the golf course a natural storm water retention basin. Water would collect there following large storms and spread out and seep into the ground, thereby protecting the rest of the Town from flooding. The Board also speculated that, if the entire golf course (or a substantial portion of it) were replaced with homes, the Town would not only lose its natural retention

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[2] This was not planning, but arbitrarily burdening the "last man out" landowners (i.e., those who prudently refrained from developing earlier) with the obligation to provide their land for the benefit of the entire community – without compensation.

[3] Thus, the idea that this regulation would provide significant recreational opportunities to the Town's population was absurd on its face. Indeed, the Town Board rejected the idea of making this a *public* golf course because it would have to increase the membership from 334 to 2000 in order to make a public club economically viable. The increase in traffic and expansion of facilities to accommodate such an increase was unacceptable. (R 181.)

basin, but the added homes would increase the general flooding burden in the area.

Again, that was fiction, because Bonnie Briar had no intention of eliminating the golf course. Its 71 planned homes, clustered in excess space in the center of the golf course, would maximize retention of open space, maintain recreation space, and preserve the Town's flood protection, while allowing Bonnie Briar to achieve its long-held goals and expectations for development.

Bonnie Briar showed the Town that its proposed development could have satisfied all the Town's goals. In a trial, the trier of fact could readily conclude likewise (compare *Del Monte Dunes*, 119 S.Ct. at 1636-1637), i.e., that the Town's regulations bore no causal relationship to their ostensible goals. Beyond that, preexisting law already provided the most significant protection (against flooding) ostensibly sought by the Town: *any residential development on the property would have been legally required – in triple-play regulatory coverage by local, state, and Federal laws – to avoid exacerbation of downstream flooding.*[4] If Bonnie Briar couldn't demonstrate full compliance with those legal

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[4] The Town's Local Law 8-1992 requires a surface water control plan that prevents increases in flooding and erosion. State and Federal law work together, as the State's Department of Environmental Protection is designated as the local enforcement agency under the Federal Clean Water Act. (See 33 U.S.C. § 1342[p]; New York Environmental Conservation Law, Articles 17 and 70.) Under the latter laws, no increase in surface water runoff is permitted after development. (R 361.) Indeed, storm water management plans must require new developments to reduce the rate of runoff from new development, increase water recharge into the ground, and decrease water quality degradation. (R 361.) The Town's expressed concern about flooding was simply a pretext.

requirements to the satisfaction of a phalanx of planning and environmental officials, it could not proceed with its planned construction.

The New York courts refused to permit the issues to be tried on their merits. The Court of Appeals concluded that the Town's regulations need bear only "a reasonable relation to the legitimate objectives stated within that law" (App., p. 11) in order to satisfy the Constitution. And it made that decision as a matter of law, without testing the conflicting evidence in trial. This Petition followed.

SUMMARY OF ARGUMENT

1. Under this Court's 5th Amendment jurisprudence, government cannot compel individuals to contribute more than their just share of the cost of providing benefits to the public. In this Court's words, the 5th Amendment bars government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." (*Armstrong v. United States*, 364 U.S. 40, 49 [1960].)

Here, the Town rezoned the subject property for three stated reasons: (1) to preserve open space for all the Town's residents at Petitioner's expense, (2) to preserve recreational opportunities for Town and area residents, also at Petitioner's expense, and (3) to mitigate flooding in the Town by providing an area on Petitioner's land for surface waters to collect, spread, and soak into the ground – all of which already existed, and which Petitioner had no intention of disturbing. In order to obtain these three benefits, the Town revoked the residential zoning that had governed the property's development (and that of the surrounding land) for generations and

thus had formed the very essence of the owner's distinct investment-backed expectations for its use and development. In plain English, the Town wanted to use this property for the benefit of its residents, but didn't want to pay for it.

But the record is also undisputed that the owners' residential development of a small, internal part of the property would not remove or impair the golf course or have any discernible impact on drainage or *cause* off-site flooding problems. Nor would it cause a significant loss of open space or reduce recreational facilities.

As a prominent land use scholar put it recently:

> "A regulation effecting a wealth transfer that benefits the public should fail when (1) there is no (or little) linkage between the owner's use of property and the goal sought to be achieved by the regulation, and (2) the government entity is seeking to create, 'off budget,' some public program or project that is not funded by the public through taxes, but by certain targeted property owners." (Jan Laitos, Law of Property Rights Protection, § 10.09[D] at 10-97 [Aspen Publishers 1999] [hereafter Laitos].)

That is what happened below. To address the three perceived problems – none of them of Bonnie Briar's making – the Town Board decided to conscript Bonnie Briar into community service gratis, i.e., in Professor Laitos' words, "off budget." The Constitution prohibits commandeering private land in that fashion.

2. This Court has repeatedly held that a regulatory taking occurs when a land use regulation "fails to substantially advance legitimate state interests. . . . " (E.g.,

Agins v. City of Tiburon, 447 U.S. 255, 260 [1980]),[5] but it has left the standards for this rule unclear. Indeed, this Court took note of the amorphous nature of this rule only last Term:

> " . . . this Court has provided neither a definitive statement of the elements of a claim for a temporary regulatory taking nor a thorough explanation of the nature or applicability of the requirement that a regulation substantially advance legitimate public interests outside the context of required dedications or exactions. . . . " (*Del Monte Dunes*, 119 S.Ct. at 1636.)

The absence of a usable explanation causes needless litigation as lower courts grope in the dark to apply this Court's standard. One could invoke the scriptural idiom and say that lower courts across the Nation are thus being called upon to make decisional bricks without doctrinal straw. (See Exodus 5:7-19.)

The decision below is emblematic. The New York court decided that a regulation passes 5th Amendment muster if it merely satisfies a "reasonableness" test. (E.g., App., p. 11.) Logically, rationally, and as a matter of English usage, however, if this Court had meant "reasonable," it would plainly have said "reasonable" – a term frequently used and well understood in the law. Instead, it required "substantial advancement of legitimate state interests" – and repeated that requirement over the years. Surely, the Court must have meant something other than

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[5] Although the complaint alleged violations of each of *Agins*'s disjunctive takings standards, Bonnie Briar has pursued on appeal only the regulation's failure to substantially advance legitimate state interests. (See App., p. 6.)

merely "reasonable." It is time to explain the meaning of the phrase.

3. This Court has repeatedly held that a property owner's "distinct, investment-backed expectations" for the use of land are entitled to 5th Amendment protection. (E.g., *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 [1978].) Indeed, this expectations factor is so important that governmental destruction of it – alone – can amount to a 5th Amendment taking. (*Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011 [1984].)

In *Penn Central*, the Court emphasized that a taking occurs when a regulatory impairment of those expectations is "not reasonably *necessary* to the effectuation of a substantial public purpose." (438 U.S. at 127; emphasis added.) The court below ignored this "reasonably *necessary*" standard and upheld the regulation *as a matter of law* because it saw a "reasonable relationship" – not necessity – between the Town's desires and their mode of accomplishment.[6] If allowed to go to trial, however, the evidence would show that the same goals could be accomplished without destroying Bonnie Briar's distinct, investment-backed expectation. That would inherently render the regulation "not reasonably *necessary*" to accomplish the Town's goal.

4. The court below compounded matters by upholding the Town's actions *as a matter of law*, even though the facts underlying the Town's assertion of a constitutional connection between what it did *to* Bonnie Briar and what

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[6] The court below further confused things by thus using a due process standard, not a regulatory takings standard. (Compare *Nollan v. California Coastal Commn.*, 483 U.S. 825, 834-835, fn. 3 [1987].)

it sought to do *for* the Town were in sharp factual dispute. And that is being charitable to the Town and the court below, because this much is virtually undisputed: nothing Bonnie Briar did or proposed gave rise to a need to prohibit all residential use of all parts of its property. At a minimum, Bonnie Briar deserved the same opportunity as the property owner in *City of Monterey v. Del Monte Dunes*, 119 S.Ct. 1624 (1999) to convince a trier of fact that there was no legitimate constitutional basis for the Town's draconian application of its regulations in this something-for-nothing manner.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW UNCONSTITUTIONALLY CONSCRIPTS PETITIONER INTO PROVIDING MUNICIPAL OPEN SPACE, RECREATION, AND A *DE FACTO* SURFACE WATER CATCH BASIN – ALL TO BENEFIT THE TOWN AS A WHOLE, AND ALL WITHOUT COMPENSATION.

In its classic formulation of the regulatory taking concept, this Court (speaking through Justice Holmes) held that "if regulation goes too far it will be recognized as a taking." (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 [1922].)

The question of how "far" is "too far" remains unclear. This case provides the opportunity to clarify the standard significantly.

One guidepost is the precept that the cost of projects benefiting the public should be socialized:

> "the Fifth Amendment's guarantee that private property shall not be taken for public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." (*Armstrong v. United States*, 364 U.S. 40, 49 [1960].)[7]

The Town has been absolutely clear throughout this process that it downzoned the Bonnie Briar property to recreational use not to interdict a nuisance or make some other private activity pay its way, but to gain public benefits. Whether the Town may properly pursue such goals is *not* the issue in 5th Amendment regulatory takings litigation. Suits such as this assume that the regulation is for a permissible purpose.[8] This litigation doesn't

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[7] *Armstrong*, of course, merely built on this Court's longstanding doctrine that the 5th Amendment's just compensation guarantee was designed to "prevent the public from loading upon one individual more than his just share of the burdens of government. . . . " *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 325 (1893); see also *Penn Central*, 438 U.S. at 124; *Pennsylvania Coal*, 260 U.S. at 416; *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1018 (1992); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 315, 3318-319 (1987); *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985); *Connolly v. Pension Benefit Guarantee Corp.*, 475 U.S. 211, 227 (1986); *Hodel v. Irving*, 481 U.S. 704, 714 (1987). For the most recent reiteration, see *Eastern Enterprises v. Apfel*, 524 U.S. 498, 141 L.Ed.2d 451, 471 (1998).

[8] For example, the Federal Circuit Court of Appeals (which reviews virtually all takings judgments against the Federal Government) has consistently affirmed judgments making the United States liable for takings that precluded development in order to further proper environmental goals. E.g., *Whitney*

seek to frustrate the regulation, but only to recover compensation for its confiscatory impact. This has been the law at least since *Hurley v. Kincaid*, 285 U.S. 95, 103 (1932).[9] The Fifth Amendment:

> "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." (*First English*, 482 U.S. at 315; emphasis, the Court's.)[10]

Each of the Town's goals is intended to benefit the Town – as a whole. While pursuit of such benefits may be proper, not paying for them is precisely the kind of thing the *Armstrong* principle was designed to guard against. Such costs should be borne by the benefitted citizenry as

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Benefits, Inc. v. United States, 926 F.2d 1169 (Fed. Cir. 1990) (surface coal mining); *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994) (limestone mining); *Creppel v. United States*, 41 F.3d 627 (Fed. Cir. 1994) (dredging and filling wetlands).

[9] This Court has consistently so held, in widely varying contexts. E.g., *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984) (trade secrets); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982) (cable TV access); *Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979) (access to navigable water); *United States v. Security Indus. Bank*, 459 U.S. 70, 75 (1982) (retroactive bankruptcy legislation).

[10] As Justice Breyer expressed it recently, "at the heart of the [Just Compensation] Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing *compensation* for legitimate government action that takes 'private property' to serve the 'public good.' " (*Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S.Ct. 2131, 2161 [1998] [emphasis in original] [dissenting opinion].) See also *Florida Rock Indus., Inc. v. United States*, 45 Fed. Cl. 21, 24-25 (Fed. Cl. 1999).

a whole, not by one singled-out property owner. (*Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 492 [1987]; *Agins*, 447 U.S. at 260.) As this Court aptly put it:

> "government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute 'takings.' " (*Penn Central*, 438 U.S. at 128.)[11]

This is not one of those circumstances in which an individual may be made to bear such a community expense because he or she proposes development that will *cause* the problems the regulation aims to solve. (Even then, there must be a causative nexus to the burdens imposed by the development.[12]) That is why there

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[11] See Laitos, § 10.09 at 10-50 [purpose of Takings Clause is to "prevent certain property owners from in effect being 'taxed' by the police power to benefit others in the general community."]; G. Torres, *Taking and Giving: Police Power, Public Value, and Private Right*, 26 Env. L. 1, 17 (1996) ["The Takings Clause was designed to prevent the government from localizing all of the burdens of a particular public policy."]; Douglas W. Kmiec, *Inserting The Last Remaining Pieces Into The Takings Puzzle*, 38 William & Mary L. Rev. 995, 997 (1997) ["The straightforward purpose of the Takings Clause is to avoid the disproportionate placement of public burdens upon a single property owner"]; Raymond Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 Am. U.L. Rev. 297, 351-352 (1990) [unconstitutional to single out "isolated individuals to . . . subsidize desired social programs"]; John Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U.L. Rev. 465, 488 (1983) [fairness within meaning of Takings Clause requires "connection between a measure's *goals* and the burdened property's *use*"].

[12] E.g., *Nollan*, 483 U.S. at 825, n. 4 (taking would occur if property owners had been "singled out" to remedy a problem they had not caused).

was no taking in *Keystone*: there, the state was "acting to protect the public interest in health, the environment, and the fiscal integrity of the area" (480 U.S. at 488) from "subsidence . . . *caused by* the extraction of underground coal" (480 U.S. at 475; emphasis added). By contrast, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court refused to permit the uncompensated thrusting on Mr. Lucas of the cost of preserving South Carolina's coast, as any of the asserted problems were not caused by his project.[13]

This case is like *Lucas* and unlike *Keystone*. None of the Town's problems was caused by Petitioner's desire to develop 71 clustered homes, leaving the bulk of the land devoted to the existing recreational use. The constitutional burden of providing community benefits is thus the community's. (See Laitos, § 10.09[A] at 10-61 [forcing landowners to provide public amenities like parks and flood control projects based "on the accident of land ownership at a particular location" is unconstitutional].)[14]

Put another way, as the Court noted in *Pennsylvania Coal*, regulations restricting the use of land might be justified if there were a "reciprocity of advantage" enjoyed by all citizens. (260 U.S. at 415.) The theory is

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[13] See also *Nollan*, 483 U.S. at 838-839 (condition was invalid taking because it was unrelated to problems caused by the construction of the property owners' new home).

[14] See also Allison Dunham, Griggs v. Allegheny County *in Perspective: Thirty Years of Supreme Court Expropriation Cases*, 1962 Sup. Ct. Rev. 63, 80-81 (1962); Arvo Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 So. Cal. L. Rev. 1, 50-51 (1971); 1 Norman Williams, Jr. and John M. Taylor, American Land Planning Law § 5A.11 at 155 (Clark Boardman Callaghan 1988 supp. 1999).

that, when land use regulation restricts all of a community's land (albeit in different ways), each restricted landowner receives the benefits of the restrictions on the others. In that way, no one is unfairly singled out to bear the burden of shaping the community's development. (*Penn Central*, 438 U.S. at 139-140.)

But Bonnie Briar enjoys no "reciprocal advantage." It suffers only detriment; it alone is forced to bear the burden of providing open space, recreational opportunity, and a flood control catch basin for the Town. All the benefits flow in one direction – toward the Town, at no cost to its citizens. Without any reciprocity, can New York's scheme pass constitutional muster? As Justice Holmes put it for this Court:

> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." (*Pennsylvania Coal*, 260 U.S. at 416.)

When a municipality uses public funds to *purchase* the open space, recreational amenities, and flood control it desires, the entire community shares the cost through taxes. But when only the regulatory power is used against a single parcel of land, it amounts to nothing more than an attempt to get something for nothing. It is precisely for such situations that the Constitution was designed as a bulwark to repel majoritarian depredations. The public, as this Court put it, acquires only those property rights

"that it has paid for." (*Pennsylvania Coal*, 260 U.S. at 415.)[15]

> "[N]othing opens the door to arbitrary action so effectively as to allow [government] officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected." (*Railway Express v. New York*, 336 U.S. 106, 112-113 [1949] [Jackson, J., concurring].)

Here, the Town took the constitutionally forbidden "shortcut." It may, in Justice Jackson's words, have momentarily "escape[d] political retribution" by obtaining those things for free, rather than raising taxes to buy them,[16] but it should not escape constitutional accountability.

In a recent commentary, even a lawyer with the U.S. Department of Justice (whose legal career consists of defending *against* takings claims) described three factors that he believed made up the "quintessential best case" for *requiring* 5th Amendment compensation. They are:

> "(1) The adverse effects of the regulation are imposed on a small number of landowners.

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[15] "A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." (*Lucas v. Colorado Gen. Assembly*, 377 U.S. 713, 737 [1964].)

[16] "The fundamental question that should be faced . . . is not *whether* these costs will be paid; it is *who* will pay them, in accordance with *what* substantive and procedural criteria, and through *which* institutional arrangements." (Arvo Van Alstyne, *Just Compensation of Intangible Detriment: Criteria for Legislative Modification in California*, 16 U.C.L.A.L. Rev. 491, 543-544 [1969] [emphasis in original].)

"(2) The benefits of the regulation are distributed widely in favor of the relevant community.

"(3) The landowner appears to be relatively 'innocent,' in that the regulation appears to be a fairly arbitrary government effort to further the public welfare, as opposed to an effort to stem a harm that is inherent in the regulated land use."[17]

Those factors fit this case like the proverbial glove. Yet the New York courts upheld the Town's something-for-nothing actions *as a matter of law*, refusing even to permit this case to go to trial.

II

THIS COURT'S RULE THAT A TAKING OCCURS IF A REGULATION FAILS TO "SUBSTANTIALLY ADVANCE LEGITIMATE STATE INTERESTS" IS IN URGENT NEED OF EXPLICATION.

At the dawn of the modern takings jurisprudence era, the Court laid down the principle that:

> "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land." (*Agins v. City of Tiburon*, 447 U.S. 255, 260 [1980]; citations omitted.)[18]

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[17] Paul J. Boudreaux, *The Quintessential Best Case for "Takings" Compensation – A Pragmatic Approach to Identifying the Elements of Land-Use Regulations That Present the Best Case for Governmental Compensation*, 34 San Diego L. Rev. 193, 195 (1997).

[18] The standard has been regularly reiterated since *Agins*. *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 647 (1981) (dissenting opinion expressing the substantive views of

This Court has also made clear that the first half of that standard doesn't depend on interference with the economic use of the regulated property: regardless of the use or value remaining, a taking may still occur and require compensation if it fails to "substantially advance legitimate state interests." (*Yee v. City of Escondido*, 503 U.S. 519, 534 [1992]; see also *Del Monte Dunes*, 119 S.Ct. at 1636-1637.)

But the Court has not clarified the meaning or application of that formulation, as the Court itself noted last Term:

> " . . . this Court has provided neither a definitive statement of the elements of a claim for a temporary regulatory taking nor a thorough explanation of the nature or applicability of the requirement that a regulation substantially advance legitimate public interests outside the context of required dedications or exactions. . . . " (*Del Monte Dunes*, 119 S.Ct. at 1636.)

As a consequence, lower courts have struggled to apply it. (See, e.g., *Dodd v. Hood River County*, 136 F.3d 1219, [9th Cir. 1998] ["test has been restated and reapplied many times, but it is still not refined with precision"]; *Reahard v. Lee County*, 968 F.2d 1131, 1135 [11th Cir. 1992] ["there has been much confusion as to when a regulation goes too far"]; *Tahoe-Sierra Preservation Council v. Tahoe Planning Agency*, 34 F. Supp. 2d 1226, 1239 [D. Nev. 1999] ["there is as yet no clear test for determining

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five Justices); *United States v. Riverside Bayview Homes*, 474 U.S. 121, 126 (1985); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 485 (1987); *Nollan v. California Coastal Commn.*, 483 U.S. 825, 835 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *Del Monte Dunes*, 119 S.Ct. at 1636.

whether a regulation substantially advances a legitimate state interest"].)

The court below added to the confusion. First, it held that "substantially advances legitimate state interests" merely means "reasonable." (App., pp. 10-11) It said it did so because that is the instruction the trial judge gave in *Del Monte Dunes*, and this Court approved the instruction. (See 119 S.Ct. at 1634.) That, however, misreads *Del Monte Dunes*. As this Court stressed there, *the city itself had proposed the instructions under which the jury found it liable for a taking, and it could therefore not complain about their content*. (119 S.Ct. at 1636.) Nor did this Court equate the standard with "reasonable" – a rational conclusion, because a perfectly reasonable regulation may not advance legitimate state interests one iota and may, in fact, be counterproductive.[19] It merely said that "reasonable" fell within the range of the Court's various regulatory takings discussions. (119 S.Ct. at 1636.) Thus, as the *Del Monte* jury found the city's conduct in applying its regulations unreasonable, the city's liability was evident. Nothing in the opinion makes the sole standard one of mere "reasonableness" in all situations.

In adopting "reasonableness" as its sole standard, the court below jettisoned the close nexus requirement between the means the Town chose and the ends it sought to accomplish; that court believed that this Court "necessarily rejected" such analysis in *Del Monte Dunes*. (App., p. 10) But no such thing happened. Although this Court

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[19] See *Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1166 (9th Cir. 1997) (if the means chosen do not substantially further the municipal goal but place an undue burden on individual property owners, then regulation violates 5th Amendment).

rejected the Ninth Circuit's gratuitous injection of the "rough proportionality" analysis of *Dolan v. City of Tigard*, 512 U.S. 374 (1994) beyond the context of exactions – which was not litigated in the trial court[20] – nothing in *Del Monte Dunes* suggests that there is no need for a close nexus between means and ends.[21] After all, it has been the law at least since *Penn Central* that a regulatory taking occurs when restriction on land use is not "reasonably necessary" to resolve community goals (see *post*, pp. 22-26), plainly requiring a "close nexus" analysis. A law without such a nexus inherently does not address the problems it purports to address, and is simply arbitrary.

Commentators of all stripes have been critical – sometimes harshly so – of the absence of reliable standards to guide courts and citizens in determining when land use regulations cross the 5th Amendment's line and require compensation. The mildest criticism is that the deficiency renders takings law a "muddle," and makes application of the rule "inconsistent." (E.g., Robert Meltz, Dwight H. Merriam, and Richard M. Frank, The Takings Issue 136, 137 [Island Press 1999]; William A. Fischel,

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[20] Specifically, this Court said that "we *have not* extended the rough-proportionality test of *Dolan* beyond the special context of exactions . . . " (119 S.Ct. at 1635; emphasis added), without concluding that such an extension *could never* be made in a proper case in the future; and that use of the concept in *Del Monte Dunes* was "unnecessary" and "irrelevant." (119 S.Ct. at 1635.)

[21] Indeed, both before and after *Del Monte Dunes*, this Court stressed the proper role of proportionality in judging the validity of legislative responses to perceived problems. See *United States v. Bajakajian*, 118 S.Ct. 2028, 2031 (1998); *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 144 L.Ed.2d 575, 592 (1999).

Regulatory Takings: Law, Economics, and Politics 51 [Harvard Univ. Press 1995].) The authors of a widely-used multi-volume land use treatise summarized their frustration by noting that "cases are decided without any attempt to develop consistent criteria, i.e., with little guide to predictability for future decisions." (1 Williams & Taylor, § 5A.02 at 135.) A Justice Department attorney concluded recently that "this system provides little guidance for government, for private citizens, or for trial court judges. The dividing line at the edge of private property rights is not only fuzzy, it is nonexistent." (Boudreaux, 34 San Diego L. Rev. at 194-195.) Others are more forceful, with one concluding that "this body of law is thoroughgoing mush. No clear line of analysis emerges, results are unpredictable, cases are inconsistent. . . . " (James V. DeLong, Property Matters 289 [Free Press 1997].) Warming to the subject, Professors Williams and Taylor summarize the lack of predictability in this field this way:

> "If there are no rules specific enough to control future decisions, then every case is decided according to the gastronomic school of jurisprudence; that is, this is an area where government acts according to gut feeling in the individual case, instead of by rule of law." (1 Williams & Taylor, § 5A.02 at 136.)[22]

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[22] As the Chief Judge of the U.S. Court of Federal Claims recently put it, "if the word 'taken' in the Fifth Amendment has no fixed meaning, other than the whim of the court, then all of the important purposes that the Framers assigned to a written Constitution are really worse than a paper wall against tyranny: they are a sham." (*Hage v. United States*, 35 Fed. Cl. 147, 151 [Fed. Cl. 1996].)

Clarification by this Court is sorely needed, and should be welcomed by all responsible participants in land use disputes, because then all will know how to act. The courts will then be spared having to preside over much needless, contentious litigation, as all sides to this problem thrust their cases at [at times] bewildered trial judges, in an effort to reduce the many variables of harsh land use regulation to precedent or, at least, to some discernible pattern. The Nation needs more than just government regulators' "gut feeling" (to borrow the Williams/Taylor description) to guide them. The urgency of nailing down some clear standards is paramount, and this case provides the appropriate vehicle for doing so.

III

THE DECISION BELOW CONFLICTS WITH OTHER COURTS BY HOLDING THAT PROPERTY OWNERS' ABILITY TO USE THEIR LAND CAN BE DESTROYED BY REGULATIONS HAVING ONLY A *REASONABLE* RELATIONSHIP TO THEIR STATED GOALS, EVEN WHEN THE DESTRUCTION IS NOT *NECESSARY* TO ACCOMPLISH THE MUNICIPAL GOALS.

This Court plainly made *necessity* a central part of any regulatory taking inquiry in *Penn Central*: "a use restriction on real property may constitute a 'taking' if not reasonably *necessary* to the effectuation of a substantial public purpose." (438 U.S. at 127; emphasis added.)

Thus, it is not enough to say – as did the New York Court of Appeals – that it was "reasonable" for the Town to provide open space, recreation, and flood protection for its residents. (App., p. 11.) That is not the issue; the necessity of the means use is the issue. Bonnie Briar was

prepared to prove that these same goals could be accomplished without this confiscatory restriction on the use of its land. In *Penn Central*'s word, the restrictions were not "necessary."

In last Term's *Del Monte Dunes*, a property owner successfully proved that "none of the City's stated reasons for denying its application was sufficiently related to the City's legitimate interests." (*Del Monte Dunes at Monterey v. City of Monterey*, 95 F.3d 1422, 1430 [9th Cir. 1996], *aff'd*, 119 S.Ct. 1624 [1999].) The evidentiary clash is discussed in detail in the 9th Circuit's opinion (95 F.3d at 1430-1432), and noted briefly by this Court's comment that the owner "submitted evidence *designed to undermine the validity of the asserted factual premises* for the city's denial of the final proposal. . . . " (119 S.Ct. at 1633; emphasis added.)

But what this Court approved in *Del Monte Dunes*, the New York Court of Appeals brushed aside when it sustained the Town's actions *as a matter of law – without trial* – even though Bonnie Briar alleged that the Town's action was not necessary to achieve its stated objectives. (App. p. 23.)

New York's position not only conflicts with the procedure approved here in *Del Monte Dunes*, it conflicts with earlier decisions of this and other courts. The following judicial statements are typical of the kind of factual analysis mandated by the *Penn Central* "necessity" requirement:

> "In short, has the Government acted in a responsible way, limiting the constraints on property ownership to those *necessary to achieve the public purpose*, and not allocating to some number of individuals, less than all, a burden that should be borne by all?" (*Florida Rock*

> *Indus., Inc. v. United States*, 18 F.3d 1560, 1571 [Fed. Cir. 1994]; emphasis added.)[23]

Whether a municipality's ultimate goal is legitimate is not the issue. Whether the means chosen to achieve that goal are "reasonably necessary" is. Thus, in *Sederquist v. City of Tiburon*, 765 F.2d 756 (9th Cir. 1984), a city denied development permission because of a perceived water shortage. On appeal from summary dismissal, the judgment was reversed for trial:

> "We have stated that we do not question the ultimate state interests advanced by Tiburon's zoning ordinance. What we question is the propriety of the means by which Tiburon wishes to achieve this planning. " (765 F.2d at 761.)

That is this case. Bonnie Briar is not questioning the propriety of the Town's concerns with open space, recreation, or flood control. The question is whether the means adopted meet *Penn Central*'s "reasonably necessary" test. That question cannot be answered as a matter of law, without hearing evidence.

This becomes critical in light of the Court's concern with providing constitutional protection to a property owner's "distinct, investment-backed expectations" for the use of land. (See *Penn Central*, 438 U.S. at 124.) Indeed, the Court has viewed the expectation factor as so important that, by itself, governmental destruction of it can amount to a 5th Amendment taking. (*Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011 [1987].) This case in

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[23] See also *Florida Rock Indus., Inc. v. United States*, 45 Fed. Cl. 21, 24 (Fed. Cl. 1999) (opinion after trial on remand); *McDougal v. County of Imperial*, 942 F.2d 668, 676 (9th Cir. 1991).

particular involves a sudden and dramatic destruction of such distinct investment-backed expectations,[24] and thus

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[24] As this case arose in New York, the dashing of the owner's expectations is made dramatic by reviewing that State's case law. In *Fred F. French Inv. Co. v. City of New York*, 39 N.Y.2d 587, 596-597, 385 N.Y.S.2d 5, *cert. den. and app. dism.*, 429 U.S. 990 (1976), the State's highest court inveighed against land use regulation that "forces the owner to assume the cost of providing a benefit to the public without recoupment" which disguises the cost by imposing it on one landowner so that "the public is not likely to have any objection to the 'cost-free' benefit." In *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 544 N.Y.S.2d 542, *cert. den.*, 493 U.S. 976 (1989), that court held that all regulatory taking claims were subject to heightened scrutiny under the Takings Clause to determine whether there was a "close nexus" between the regulatory means and the stated goals. In *Manocherian v. Lenox Hill Hosp.*, 84 N.Y.2d 385, 618 N.Y.S.2d 857 (1994), *cert. den.*, 514 U.S. 1109 (1995), the same court held that, even in the absence of economic harm to the property owner, the government must show a "close causal nexus" between its means and its end in order to prove the substantial advancement of legitimate state interests. In *Rent Stabilization Assn. v. Higgins*, 83 N.Y.2d 156, 174, 608 N.Y.S.2d 930, 938 (1993), *cert. den.*, 512 U.S. 1213 (1994) the court applied the "close causal nexus" test to a rent control regulation. Even when it refused to find a regulatory taking, as in *Gazza v. New York State Dept. of Env. Cons.*, 89 N.Y.2d 603, 616, 657 N.Y.S.2d 555, 561, *cert. den.*, 118 S.Ct. 58 (1997), the court reiterated that "any takings analysis involves the resolution of whether the government legislation is supported by a substantial state interest *and close nexus*." (Emphasis added.) In each case, this Court's review was sought, but certiorari was denied. And then, in the case at bench, the New York Court of Appeals did an abrupt about-face.

The opinion below reaches the wholly opposite doctrinal result from each of the above, and does so without even trying to explain why or how the court below came to this startling conclusion. Those – like Bonnie Briar – who operated under the reasonable expectation that the New York Court of Appeals

implicates concerns that are broader than only a threat to property rights, although that is serious enough.

In order to invest in land and in the costly and risky business of providing housing at all economic levels, would-be developers must have some assurance that their investment, their planning, and their reasonable expectations that go into making the decision to build housing cannot be casually snuffed out – by overreaching regulations. There must be a requirement that those regulations bear a *causal* relationship to the asserted municipal objectives, and that they are not imposed solely on the vague assertion that they are "reasonable." As it is, the development business is risky, a fact of life that translates into an alarmingly high cost of housing. That problem can only grow worse if those risks are further compounded by having to endure without meaningful remedy a whimsical regulatory scheme in which the *ad hoc* notions of each small municipality, not the Constitution, become the *de facto* "supreme law of the land."

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meant what it said in its quarter-century of consistent regulatory taking decisions were had. (Compare *Hughes v. Washington*, 389 U.S. 290, 297-298 [1967] [Stewart, J., concurring] [sudden change in judicial interpretation of state law that vitiates pre-existing property rights is a denial of due process and a taking].)

IV

THERE IS CONFLICT IN THE LOWER COURTS ABOUT WHETHER, ON CONFLICTING EVIDENCE, A LAND USE REGULATION CAN BE PRONOUNCED CONSTITUTIONAL *AS A MATTER OF LAW*, THUS DENYING PROPERTY OWNERS THE RIGHT TO A TRIAL ON THE MERITS REQUIRED BY THIS COURT IN *DEL MONTE DUNES*.

Last Term, in *Del Monte Dunes*, 119 S.Ct. 1624, this Court affirmed a compensatory judgment for a property owner because a municipality's land use regulatory actions had failed both prongs of the *Agins* test. That is, the *evidence adduced at trial* supported findings that the city's action denied the property owner economically viable use of the land *and also* failed to substantially advance a legitimate state interest.

Del Monte Dunes is critical here because *there* this Court approved a procedure permitting a property owner to offer proof at trial that a municipality's justification for severe regulatory action does not fit the constitutional matrix. Although the primary issue litigated in this Court was whether this was a decision for a jury or a judge, it is apparent that no Justice of this Court doubted that – before one trier of fact or the other – the validity of the city's actions would be subjected to trial.[25] This Court curtly rebuffed the city's suggestion that *neither* judge nor

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[25] The dissenters believed that a decision on the merits of the city's action should have been made by the trial judge. Hence, they concluded that on remand no retrial would be necessary, and the judge could reach the same conclusion as the jury if he simply entered his own findings to support it. (119 S.Ct. at 1661, n. 14.)

jury could "second-guess public land-use policy." (119 S.Ct. at 1635.)

> "To the extent the city argues that, *as a matter of law*, its land-use decisions are immune from judicial scrutiny under all circumstances, its position is contrary to settled regulatory takings principles. We reject this claim of error." (119 S.Ct. at 1637; emphasis added.)

Below, in stark contrast, the New York Court of Appeals held *precisely* what this Court rejected out of hand in *Del Monte Dunes*: it held *as a matter of law* that the Town's regulatory actions were immune from factual judicial scrutiny, denying Bonnie Briar the opportunity to make the same kind of showing that Del Monte Dunes made.

Del Monte Dunes' conclusion – that a trial is necessary to determine whether a city's regulatory actions "substantially advance a legitimate state interest" – was in keeping with this Court's repeated conclusion that there are no easy rules for regulatory taking cases and each must be decided *ad hoc* on its own facts. (E.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 [1992]; *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 [1984]; *Kaiser Aetna v. United States*, 444 U.S. 164, 175 [1979]; *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 [1978].) If each case is to be decided *ad hoc* on its own facts, then summary disposition as a matter of law must be used sparingly, and only where the facts are not in dispute as they are here. The holding below is thus at odds with the constitutional doctrine laid down by this Court.

The issues necessary to determine whether regulatory action "substantially advances legitimate state interests" can be manifold and complex. (See, e.g., *Lucas*, 505

U.S. at 1030-1031; *McDougal v. County of Imperial*, 942 F.2d 668, 680 [9th Cir. 1991]; *Kavanau v. Santa Monica Rent Control Bd.*, 16 Cal.4th 761, 775 [1997] [listing ten factors for analysis in what the court said was "not a comprehensive enumeration of all the factors that might be relevant to a takings claim".)

When the New York Court of Appeals refused to permit Bonnie Briar to produce evidence to demonstrate the lack of necessity for the Town's draconian regulation, it contradicted this Court's constitutional doctrine, created conflict among decisions on this issue, and removed the mantle of 5th Amendment protection from New York's landowners, whose "distinct investment-backed expectations" have been suddenly reduced to empty words. This Court's review is needed to restore that protection.

CONCLUSION

Private property and personal liberty, as this Court aptly put it in *Lynch v. Household Fin. Co.*, 405 U.S. 538, 552 (1972), are interdependent – neither has meaning without the other. There are no societies in which a high degree of personal and political freedom does not correlate with a similarly high degree of economic freedom. To be enjoyed, and thus fulfill their role in the constitutional scheme that protects life, liberty, and property from governmental overreaching, property rights must enjoy stability and legal protection. But the economic advantages enjoyed by citizens and rightly thought of as their "property" can only rise to the level of "rights" when they are protected by law. (*United States v. Willow River Power Co.*, 324 U.S. 499, 502 [1945].)

There is such confusion in regulatory takings law today, that too often the rights of property owners cannot be said to have the law's protection. Granting certiorari in this case will provide the Court with the opportunity to explicate some of the core issues. Petitioner prays that it do so.

Respectfully submitted,

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Bonnie Briar Syndicate, Inc., Appellant, v.
Town of Mamaroneck, et al., Respondents.

No. 176

COURT OF APPEALS OF NEW YORK

94 N.Y.2d 96; 721 N.E.2d 971;
1999 N.Y. LEXIS 3739; 699 N.Y.S.2d 721

November 23, 1999, Decided

LEVINE, J.:

Plaintiff owns a 150-acre tract of land in the Town of Mamaroneck which, since 1921, has been used as a private golf course. This appeal addresses whether the change in zoning of plaintiff's property in 1994, from residential to solely recreational use, constituted a regulatory taking under the Fifth and Fourteenth Amendments to the United States Constitution. Resolution of this question requires us to ascertain the appropriate standard to be applied in reviewing the sufficiency of the relationship between the Town's interests and the rezoning determination on this purely regulatory taking claim.

The Bonnie Briar Country Club has leased the land from plaintiff since 1921. The following year, the area in which the Club is located for the first time became subject to a zoning ordinance. The land was zoned for residential use, permitting single family detached homes on lots of at least 15,000 and, in some areas, 30,000 square feet. The area surrounding Bonnie Briar was similarly zoned, and over the years has been developed in accordance with those zoning restrictions.

In the 1960's, the Town of Mamaroneck began to focus on its diminishing open spaces and in 1966 developed a "Master Plan" in order to address the issue in a comprehensive manner. This Master Plan recommended that Bonnie Briar remain a golf course. A Master Plan "Update" in 1976 recommended that another neighboring golf course – the Winged Foot – also affected by the rezoning in Local Law 6, remain a golf course. In 1985, the two golf course properties were included in a land use study, "Westchester 2000." That study also recommended the retention of the golf course properties as recreational areas and open spaces, concluding that development of these properties would increase the risk of flooding from the Sheldrake River. A portion of plaintiff's property is within the flood plain of the Sheldrake River. In its current non-developed state, the land helps control flooding by acting as a natural detention basin for rising river waters due to storms.

In 1986, the Towns of Mamaroneck and Larchmont together adopted a "Local Waterfront Revitalization Program" (LWRP) for a comprehensive examination of land-use policies. The LWRP was primarily concerned with, and sought effectively to protect against, the flooding potential in both the flood plain and coastal areas. The LWRP identified flood damage to the Town's wetlands, fish and other wildlife habitats and streams, cautioning the Town to prepare itself for further adverse effects that would result from future changes in land use.

The LWRP found that the Town golf clubs were "appropriate uses which, in addition to their ecological, recreational, architectural and scenic value, provide open

space and natural water retention. They should remain in their present use if possible."

In 1988 the Town retained Shuster Associates, a private planning firm, to assist in formulating its comprehensive plan to address and best implement the goals stated in the LWRP. Shuster examined a number of varying development options and issued a report and addendum considering three alternative development schemes. These development schemes did contemplate some residential development, not unlike that subsequently proposed by plaintiff.

Because rezoning these golf course properties required a review pursuant to the State Environmental Quality Review Act ("SEQRA"), on May 30, 1990, defendant Town Board declared its intention to serve as lead agency for the purpose of conducting the SEQRA review and retained yet another planning firm to assist in the review process. After preparation of a Generic Environmental Impact Statement in 1991, the Board issued a Findings Statement in completion of its SEQRA review in 1994. The Findings Statement described in great detail how the various proposed development and rezoning schemes would impact this environmentally sensitive area.

Specifically, the Findings Statement noted that the area was facing "long – term pressure toward continuing urbanization in an already over-developed landscape," noting that "less than 5% of the Westchester County watershed of the Long Island Sound remains open space." In response to these concerns over dwindling existing open spaces and to ensure their retention, the

Board determined that zoning the Winged Foot and Bonnie Briar club properties solely for recreational uses was the best alternative.

In addition, the Findings Statement explained that further residential development would frustrate the Town's goal of preserving recreational opportunities for Town and area residents, noting that 70% of Bonnie Briar's membership resided within a five-mile radius of the property.

Finally, in connection with concerns over flooding, the SEQRA Findings Statement noted that, without even considering further development beyond the Town's control, residential development within the Town could increase the flooding already experienced by many area homeowners. Furthermore, the Board was not adequately persuaded that proposed measures to mitigate the increased flooding associated with residential development would be effective.

Based upon all of the foregoing considerations, the Findings Statement concluded that the "Recreation Zone best achieves the objectives of the Town, State, regional and federal policies that have guided the Town's comprehensive planning process for almost three decades." The Town Board rezoned accordingly, enacting Local Law 6.

Just months prior to the passage of that law, plaintiff retained its own planning firm and submitted a Preliminary Subdivision Plan for the golf club property to the Town Board. This plan provided for the construction of 71 residential lots, leaving approximately 112 acres of standing open space on the existing 18-hole golf course site. Upon receipt of this plan submitted by plaintiff, the

Town Board requested certain revisions with which the plaintiff complied. The final plan submitted by plaintiff comported with the various possible development schemes recommended to the Board by the Shuster planning firm. In the end, however, as previously discussed, the Board chose to implement a rezoning of the property for exclusively recreational use to achieve its stated goals and interests of (1) preserving open space, (2) providing recreational opportunities for Town and other area residents and (3) mitigating flooding of both coastal and flood plain areas.

Plaintiff subsequently commenced this action, the main thrust of which was that Local Law 6 effected an unconstitutional taking of its property without just compensation. Plaintiff averred that Local Law 6 was not sufficiently related to the three stated purposes and that the application of the zoning ordinance deprived them of all economically viable uses of their land. Plaintiff moved for summary judgment on a number of its various causes of action; defendant opposed the motion and cross-moved for summary judgment dismissing the same claims.

Supreme Court granted defendant partial summary judgment, dismissing plaintiff's cause of action in which it alleged that there was an insufficiently close relationship between the Town's goals and its zoning ordinance. That holding was affirmed by the Appellate Division (*Bonnie Briar Syndicate v. Town of Mamaroneck*, 242 A.D.2d 356, 661 N.Y.S.2d 1005). Subsequently, defendants moved for summary judgment on the remaining causes of action concerning the alleged economic taking of plaintiff's property brought about by the enactment of Local Law 6.

This motion was denied by Supreme Court. The Appellate Division reversed, granting defendant's motion and remitting to Supreme Court for the entry of judgment declaring the law constitutional as applied in this case (*Bonnie Briar Syndicate v. Town of Mamaroneck*, 256 A.D.2d 293, 681 N.Y.S.2d 329). This appeal is before us as of right (CPLR 5601 [b] [1]). We now affirm.

DISCUSSION

In *Agins v. Tiburon* (447 U.S. 255, 65 L. Ed. 2d 106, 100 S. Ct. 2138), the United States Supreme Court articulated the general test for determining whether "[t]he application of a general zoning law to particular property effects a taking" (*id.*, at 260). *Agins* held that a zoning law effects a regulatory taking if either: (1) "the ordinance does not substantially advance legitimate state interests" or (2) the ordinance "denies an owner economically viable use of his land" (*id.*). Plaintiff has abandoned its claim that it has been denied all economically viable uses of its land. Thus, its only remaining claim is that the "substantially advance" alternative regulatory taking-prong of Agins is not met here because there is an insufficiently "close causal nexus" (*Manocherian v. Lenox Hill Hosp.*, 84 N.Y.2d 385, 392; 618 N.Y.S.2d 857, 643 N.E.2d 479; *Rent Stabilization Assoc. of New York City v. Higgins*, 83 N.Y.2d 156, 174, 608 N.Y.S.2d 930, 630 N.E.2d 626; *see, Nollan v. California Coastal Commn.*, 483 U.S. 825, 97 L. Ed. 2d 677, 107 S. Ct. 3141), between the rezoning measure and the legitimate public interests defendants sought to achieve.

Relying on this Court's decisions in *Seawall Assocs. v. City of New York* (74 N.Y.2d 92, 544 N.Y.S.2d 542, 542 N.E.2d 1059) and *Manocherian v. Lenox Hill Hosp.* (*supra*),

plaintiff claims that Local Law 6 fails to meet the *Agins* standard because there is not a "close causal nexus" between the Town's objectives and Local Law 6. Plaintiff argues that this was demonstrated as a matter of law, because in the opinion of the Shuster planning firm the same three objectives could be accomplished by less restrictive land control, permitting some residential development. We disagree with plaintiff's analysis and reject its proposed standard of review.

The close causal nexus standard urged by plaintiffs was derived from two United States Supreme Court cases, *Nollan v. California Coastal Commn.* (*supra*) and *Dolan v. Tigard* (512 U.S. 374, 129 L. Ed. 2d 304, 114 S. Ct. 2309). In *Nollan*, the Supreme Court applied the "substantially advances" prong of the *Agins* standard for a regulatory taking in the context of an exaction. In that case, the State had conditioned the granting of a permit to build a larger residence upon the owners' conveyance of a public easement across the property. In that specific circumstance, the Supreme Court applied the Agins standard to require an "essential nexus" between the property interest exacted from the owner and the identified legitimate governmental objective.

Seven years later, the Supreme Court decided *Dolan v. Tigard* (*supra*), another exaction case, in which the municipality conditioned a permit for an expansion of a commercial establishment upon a dedication of portions of the owner's property for recreational and flood-control uses. In *Dolan*, the Court elucidated its "essential nexus" requirement in such cases. The Court explained that the essential connection is more than merely some relationship, but, on the other hand, the municipality need not

"demonstrate that its exaction is directly proportional to the specifically created need" (*Dolan*, 512 U.S. at 388-390). The Court adopted an intermediate position, i.e., that the essential nexus is a "rough proportionality" between the required exaction and the governmental interests involved (*id.*, at 391).

Following the Supreme Court's *Nollan* and *Dolan* decisions, there was considerable disagreement as to the reach of those holdings. There were takings scholars who read the cases as creating a new standard for all regulatory takings (*see*, Peterson, Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches, 39 Hastings L.J. 335, 351; Kmiec, The Original Understanding of the Takings Clause is Neither Weak Nor Obtuse, 88 Colum. L. Rev. 1630, 1648-1654). Indeed, even Justice Brennan, is his dissent in *Nollan*, expressed concern over the heightened level of scrutiny, predicting its general application in takings cases: "the Court demands a degree of exactitude that is inconsistent with our standard for reviewing the rationality of a State's exercise of its police power for the welfare of its citizens" (*Nollan v. California Coastal Commn.* 483 U.S. at 842-843.

Other takings scholars opined that the heightened level of judicial scrutiny was applicable only in the specific context of an exaction (*see*, Michelman, Takings, 1987, 88 Colum. L. Rev. 1600, 1608-1609; Manheim, Tenant Eviction Protection and the Takings Clause, 1989 Wis. L. Rev. 925, 949-950, nn 146, 149; Tribe, American Constitutional Law @ 9-4, at 599, n 20 [2d ed]). Judges on this Court likewise differed in interpreting this line of cases (compare, *Seawall Assocs. v. City of New York*, 74 N.Y.2d 92, 544 N.Y.S.2d 542, 542 N.E.2d 1059, with *id.*, at 117 [Bellacosa,

J., dissenting]; compare, *Manocherian v. Lenox Hill Hosp.*, 84 N.Y.2d 385, 618 N.Y.S.2d 857, 643 N.E.2d 479, with *id.*, at 400 [Levine, J., dissenting]).

The issue was finally resolved by the *United States Supreme Court in City of Monterey v. Del Monte Dunes* (526 U.S. 687, 143 L. Ed. 2d 882, 119 S. Ct. 1624),[1] in which the Court reaffirmed the continued viability of the *Agins* standard in regulatory takings that do not involve an exaction. In *Del Monte*, the Court expressly held that where, as here, "the landowner's challenge is based not on excessive exactions but on a denial of development- * * * the rough proportionality test of *Dolan* is inapposite" (*id.*, 143 L. Ed. 2d, at 900).

Plaintiff concedes that *Del Monte* clearly removed *Dolan*'s "rough proportionality" inquiry from a general regulatory takings analysis. It asserts, instead, that because the Supreme Court failed expressly to declare as inapplicable *Nollan*'s "essential nexus" test, a reviewing court is still bound to determine if a generally applicable zoning regulation has a close nexus with the interests sought to be furthered. We disagree.

Two reasons persuade us to reject plaintiff's contention that *Del Monte* has left *Nollan*'s "essential nexus" test applicable in all takings cases. First, as we have previously demonstrated, the "rough proportionality" test

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[1] As shown in both *Del Monte Dunes and Eastern Enterprises v. Apfel* (524 U.S. 498, 141 L. Ed. 2d 451, 118 S. Ct. 2131), no majority has accepted the invitation to rework the *Agins* standard (*see*, the response of the Court to the contentions of the amici in *Del Monte, supra*, 143 L. Ed. 2d, at 901). We similarly decline to address or revisit that standard.

articulated in *Dolan* was nothing more than the Court's explication of the required closeness of the connection between the condition of development and the governmental objective under the essential nexus standard in an exaction case. Thus, in explicitly rejecting the application of the "rough proportionality" test when, as here, the zoning law merely "den[ies] * * * development" (*City of Monterey v. Del Monte Dunes, supra*, 143 L. Ed. 2d, at 900), limiting its application to those cases involving exactions, the Supreme Court necessarily rejected the applicability of the "essential nexus" inquiry to general zoning regulations as well. Second, our disagreement with the plaintiff's reading of *Del Monte* is confirmed by the Court's treatment of the other major issue before it in that case: whether, in a 42 U.S.C. § 1983 damage action for an unconstitutional taking, the plaintiff was entitled to have a jury consider the validity of that alleged taking. Although the *Del Monte* Court was divided over the issue of the availability of a jury trial, all concurring and dissenting Justices agreed upon the applicable standard and that the charge given by the trial court accurately reflected the current standard for regulatory takings analysis when no exaction is involved. The trial court in *Del Monte* instructed the jury that

"one of your jobs as jurors is to decide if the city's decision here substantially advanced any such legitimate public purpose.

"The regulatory actions of the city or any agency substantially advance a legitimate public purpose if the action bears a reasonable relationship to that objective" (*City of Monterey v. Del Monte Dunes, supra*, 143 L. Ed. 2d, at 899 [emphasis supplied] [alterations in the original]).

Importantly, this charge makes no reference at all to a necessary essential nexus between the regulation at issue and the governmental interests at stake.

Here, Local Law 6 easily qualifies as a valid regulatory denial of development pursuant to a generally applicable zoning law. Because zoning plaintiff's property for solely recreational use bears a reasonable relation to the legitimate objectives stated within that law (to further open space, recreational opportunities and flood control), the regulatory action here substantially advances those purposes (*see, City of Monterey v. Del Monte Dunes, supra,* 143 L.Ed. 2d, at 899).

As we have already described in detail, this shift in the zoning districts was in response to years of study and documentation regarding the recurrent flooding problems and concerns. The LWRP concluded that "in addition to their ecological, recreational, architectural and scenic value, [the properties' exclusive use as golf courses] provides open space and natural water retention." Consequently, the LWRP recommended that the golf courses "should remain in their present use if possible."

That defendant Board had before it other less restrictive options to choose from in arriving at its ultimate conclusion with respect to zoning is irrelevant. So long as the method and solution the Board eventually chose substantially advances the public interest, it is not this Court's place to substitute its own judgment for that of the Zoning Board (*see, Rent Stabilization Assoc. of New York City, Inc. v. Higgins,* 83 N.Y.2d 156, 174, 608 N.Y.S.2d 930, 630 N.E.2d 626 ["The question before us, however, is not the

general wisdom or desirability of * * * [the regulation] – that is a question for the legislature"]). It is similarly not for this Court to determine if, in regulating land use, the rezoning determination was more stringent than one might reasonably conclude was necessary to further public objectives (*see, Keystone Bituminuous Coal Assoc.*, 480 U.S. 470, 487 n 16, 94 L. Ed. 2d 472, 107 S. Ct. 1232 ["That a land use regulation may be somewhat overinclusive or underinclusive is, of course, no justification for rejecting it"]).

We have considered plaintiff's remaining claims and find them to be without merit.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Bonnie Briar Syndicate, Inc., respondent, v
Town of Mamaroneck, et al., appellants.

98-01038

SUPREME COURT OF NEW YORK,
APPELLATE DIVISION,
SECOND DEPARTMENT

256 A.D.2d 293; 681 N.Y.S.2d 329;
1998 N.Y. App. Div. LEXIS 13206

October 30, 1998, Argued
December 7, 1998, Decided

OPINION: DECISION & ORDER

To establish a successful claim that a land regulation has effected a taking of his or her property, a property owner must show by "dollars and cents" evidence that under no use permitted by the challenged regulation would his property be capable of producing a reasonable return (*de St. Aubin v. Flacke*, 68 N.Y.2d 66, 77, 505 N.Y.S.2d 859, 496 N.E.2d 879). "The economic value, or all but a bare residue of the economic value, of the parcels must have been destroyed by the regulations at issue" (*de St. Aubin v. Flacke, supra*, at 77, *see also, Spears v. Berle*, 48 N.Y.2d 254, 263, 422 N.Y.S.2d 636, 397 N.E.2d 1304; *Matter of Grimpel Assoc. v. Cohalan*, 41 N.Y.2d 431, 432, 393 N.Y.S.2d 373, 361 N.E.2d 1022; *Clearwater Holding v. Town of Hempstead*, 237 A.D.2d 400, 655 N.Y.S.2d 768; *Matter of Licari v. Scheyer*, 193 A.D.2d 604, 597 N.Y.S.2d 165; *Matter of W.W.W. Assocs. v. Rettaliata*, 175 A.D.2d 133, 572 N.Y.S.2d 22; *Matter of Kransteuber v. Scheyer*, 176 A.D.2d 724, 574 N.Y.S.2d 968, affd. 80 N.Y.2d 783, 587 N.Y.S.2d 272, 599 N.E.2d 676).

Here, the valuation report proffered by the plaintiff demonstrated that notwithstanding the enactment of the challenged ordinance, the subject property was capable of earning a reasonable return and was not deprived of "all but a bare residue" of value. Accordingly, the Supreme Court erred in denying the defendants' motion.

The plaintiff's remaining contentions are without merit.

COPERTINO, J.P., SULLIVAN, KRAUSMAN and FLORIO, JJ., concur.

Bonnie Briar Syndicate, Inc., Appellant, v.
Town of Mamaroneck et al., Respondents.

96-06463

SUPREME COURT OF NEW YORK,
APPELLATE DIVISION,
SECOND DEPARTMENT

242 A.D.2d 356; 661 N.Y.S.2d 1005;
1997 N.Y. App. Div. LEXIS 8456

June 10, 1997, Argued
August 25, 1997, Decided

OPINION: Ordered that the order and judgment is affirmed, with costs.

Zoning enactments have a strong presumption of constitutionality, and while such presumption may be rebutted, unconstitutionality must be demonstrated beyond a reasonable doubt (*see, Clearwater Holding v. Town of Hempstead*, 237 A.D.2d 400; *Curtiss-Wright Corp. v. Town of East Hampton*, 82 A.D.2d 551). The plaintiff failed to meet that burden.

In 1994 the Town of Mamaroneck adopted Local Laws, 1994, No. 6, which rezoned an area of the Town as a Recreational District. The plaintiff, whose property falls within the rezoned area, contends that the law is unconstitutional. The record, however, demonstrates that an essential nexus exists between Local Laws, 1994, No. 6 and the legitimate governmental interests of, inter alia, preserving open space and preventing the risk of additional flooding and other related adverse environmental effects (*see, Matter of Grogan v. Zoning Bd. of Appeals*, 221 A.D.2d 441; *cf., Dolan v. Tigard*, 512 U.S. 374; *Nollan v. California Coastal Comm'n.*, 483 U.S. 825; *Manocherian v.*

Lenox Hill Hosp., 84 N.Y.2d 385, cert. denied 514 U.S. 1109). Accordingly, the plaintiff's motion was properly denied and the defendants' cross motion was properly granted.

The plaintiff's remaining contentions lack merit or are academic in light of our determination.

ROSENBLATT, J.P., and O'BRIEN, RITTER and SANTUCCI, JJ., concur.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: PETER M. LEAVITT

BONNIE BRIAR SYNDICATE, INC.,

Plaintiff,

- against -

THE TOWN OF MAMARONECK, THE TOWN BOARD OF THE TOWN OF MAMARONECK, ELAINE PRICE, Supervisor, KATHY O'FLINN, PAUL RYAN, VALERIE O'KEEFFE, and BARRY WEPRIN, as members of the Town Board,

Defendants.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order with notice of entry upon all parties.

Index No. 22037/94
Motion Date: 2/13/96

(Filed July 3, 1996)

The following papers numbered 1 to 88 were read on these motions for summary judgment:

Notice of Motion/Affidavits	1-5
Notice of Cross-Motion/ Affidavits/Exhibits	6-27
Replying Affidavits/Exhibits	28-58
Memoranda of Law/Exhibits	59-63
Exhibits	64-88

Upon the foregoing papers filed herein, it is ORDERED that these motions are disposed of as follows:

This is an action for declaratory, injunctive and monetary relief, in which plaintiff seeks, among other things,

an order of this Court declaring recent amendments to the zoning Ordinance and the Zoning Map of the Town of Mamaroneck unconstitutional as a taking of plaintiff's property without just compensation and due process in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article One, Sections Six and Seven, of the New York State Constitution. Plaintiff moves for partial summary judgment on its first, second, third, fourth, ninth and tenth causes of action. Defendants oppose and cross-move for summary judgment. The following facts are either undisputed or apparent from the submissions in support of, and opposition to, the motions.

Plaintiff is the owner of an approximately one hundred fifty (150) acre parcel of land in the Town of Mamaroneck on which is located the Bonnie Briar Country Club (hereafter, "Bonnie Briar"). Bonnie Briar has been continuously operated as a private club since prior to the enactment of the Town's original zoning ordinance in 1922. For this entire period, the zoning district in which Bonnie Briar was located – which also contained all of another private country club, and a portion of a third – had been classified "R-30" and "R-15" – i.e., single family residential dwellings on minimum lots of thirty thousand (30,000) and fifteen thousand (15,000) square feet. In 1990 defendant, Town Board of the town of Mamaroneck (hereafter, "the Board"), took under consideration a proposal to change the classification of said district by upzoning it. On July 24, 1994, following a lengthy review in accordance with the mandates of article

8 of the Environmental Conservation Law[1], the Board adopted Local Law #6-1994 which established a new Recreation Zone (hereafter "R") district – permitted principal uses are limited to private recreation facilities, such as country clubs, golf courses, and horseback riding, tennis, swimming and fitness facilities; no residential development is permitted – and amended the Zoning Map of the Town of Mamaroneck. Pursuant to this amendment Bonnie Briar – as well as one of the other private country clubs – is now wholly contained within said "R" district. In December, 1993 – while the Board was considering the Final Generic Environmental Impact Statement which had been commissioned as part of its review – plaintiff submitted to the Planning Board for the Town of Mamaroneck a proposal for the residential development of Bonnie Briar. This proposal was, of course, rejected following the enactment of Local Law #6-1994.

The stated purpose of Local Law #6-1994,

> "is to insure the maintenance of important open space and recreational resources within the Town, reduce the potential for substantial flood hazard and maintain the suburban quality of the community as a whole". [Local Law #6-1994(1)]

Plaintiff does not contest that such objectives are not legitimate interests of a municipal governmental body the attainment of which may be accomplished through the

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[1] By decision and order entered July 6, 1995, this Court denied plaintiff's petition for an order annulling documents and findings prepared and made by the Board in connection with said review. (*Matter of Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck, et al*, S. Ct., Westchester County, Index No. 2958/93)

enactment and amendment of land use restrictions. [See, e.g., *Agins v. City of Tiburon*, 447 U.S. 255, 261, 100 S. Ct. 2138 (1980); *Penn Central Transportation Company v. City of New York*, 438 U.S 104, 98 S. Ct. 2646 (1978)] Plaintiff complains, however, that the means which defendants purport to utilize – i.e., the creation of an "R" district and the amendment of the zoning map locating plaintiff's property wholly within said district: are *ultra vires*, in violation of Sections 261 and 263 of the Town Law; are irrational and not reasonably related to said legitimate interests and, therefore, violate plaintiff's constitutional right to due process of law, and; do not substantially advance said interests and are, therefore, not a reasonable exercise of the Town's police power. Further, plaintiff argues that Local Law #6-1994 lacks a "close causal nexus" to its putative purposes and that its absolute prohibition of residential development on plaintiff's property lacks a "rough proportionality" to the possible impacts of such development.

Putting aside for the moment the question of whether Local Law #6-1994 violates plaintiff's due process rights, or constitutes an unconstitutional taking of plaintiff's property, upon application of the appropriate standards, plaintiff's invocation of the catch-phrases, "close causal nexus" and "rough proportionality", are both out of context and entirely inefficacious for the analysis required herein.

These phrases represent the heightened scrutiny used in the analysis of State action in which the grant of a permit, license, variance or some other form of grace or dispensation to a landowner is conditioned upon said landowner's forfeiture of one or more of the individual

rights – e.g., the right to exclude others from access to one's property – in the proverbial "bundle of rights" which together constitute the essence of "property". [*Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141 (1987) ("essential nexus"); *Dolan v. City of Tigard*, ___ U.S. ___, 114 S. Ct. 2309 (1994) ("rough proportionality")] As in any "regulatory" taking scenario, a property owner is not entitled to compensation if the action advances "legitimate State interests" and does not deprive him of "an economically viable use of his land". [*Keystone Bituminous Coal Association v. DeBenedicitis*, 480 U.S. 470, 485, 107 S. Ct. 1232 (1987)] However, the power to compel the forfeiture of property rights from individual landowners in the name of the public welfare – as, for example, by compelling the grant of a public easement in exchange for a building permit – creates enormous possibilities for municipal extortion. (See *Nollan v. California Coastal Commission*, 483 U.S. at 841) Consequently, in order to pass constitutional muster, there must exist an "essential nexus" between the condition imposed and the governmental goal which it purportedly serves. (*Nollan v. California Coastal Commission, supra*) Moreover, the extent of the forfeiture extracted from the property owner must be "roughly proportional" to the impact which the proposed undertaking for which the owner seeks dispensation will have upon the public welfare.[2] [*Dolan v. City of*

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[2] Thus, using Justice Scalia's hypothetical example in *Nollan*: certainly the State can prohibit the shouting of "fire" in a crowded theater in order to promote public safety, but the collection of a tax from those who seek dispensation from such prohibition does not advance that end; i.e., there is no nexus between the condition imposed in exchange for such

Tigard, 114 S. Ct. at 2318-22; see also, *Grogan v. Zoning Board of Appeals of the Town of East Hampton*, ___ A.D.2d ___, 633 N.Y.S. 2d 809 (2nd Dept., 1995)]

However, legislative enactments establishing restrictions on the use of land which are generally applicable throughout a municipality and regardless of the identity or character of the landowners, such as a zoning ordinance, do not present this opportunity for "extortion". Nor does the Court imply that there is, or should be, any meaningful distinction – for "takings" analysis purposes – between State action which is "legislative" as opposed to "administrative". [See *Parking Association of Georgia, Inc. v. City of Atlanta*, ___ U.S. ___, 115 S. Ct. 2268 (1995), Thomas, J. dissenting] Rather, the enactment of a zoning ordinance simply does not entail the offer or solicitation of any dispensation, or the forfeiture of a property right or imposition of a condition in exchange therefor. Accordingly, the "close causal nexus"/"rough proportionaltiy" standards have no meaning and, indeed, have never been applied, in this context.[3]

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dispensation and the governmental goal purportedly served thereby. (483 U.S. at 837) And, extrapolating upon that hypothetical: a requirement that one seeking entry to a theater forfeit his right to speak at all is far more restrictive a measure than a prohibition against shouting "fire", and would further promote public safety only incrementally, if at all; i.e., the condition imposed as the price of admission is disproportionate to the impact which unregulated speech would have on public safety.

[3] Plaintiff's reliance upon, *Manocherian v. Lenox Hill Hospital*, 84 N.Y.2d 385 (1994), *Seawall Associates v. City of New York*, 71 N.Y.2d 92 (1989) and *Rent Stabilization Assoc. of New York City, Inc. v. Higgens*, 189 A.D.2d 594 (1st Dept., 1993), is

This is not to say, of course, that the enactment or amendment of a zoning ordinance can never constitute a confiscatory taking of property; clearly, it can. [E.g., *Vernon Park Realty, Inc. v. City of Mount Vernon*, 307 N.Y. 493 (1954)] But a property owner bears the heavy burden of proof beyond a reasonable doubt that the ordinance is unconstitutional. [See *Curtiss-Wright Corp. v. Town of East Hampston*, 82 A.D.2d 531 (2nd Dept., 1981)] Plaintiff cannot satisfy that burden herein.

Plaintiff argues that all of the objectives which Local Law #6-1994 purportedly serves could have been accomplished as well – if not, indeed, more efficiently – without the absolute prohibition on residential development which inclusion in an "R" district entails. Thus, the amendment of the zoning map which resulted in such inclusion of plaintiff's property was not necessary to advance said State interests. However, as defendants point out, the Town was not required to explore or utilize alternative measures which would place less restrictions on the possible uses to which plaintiff's property might be put. [See *Tilles Investment Company v. Town of Huntington*, 137 A.D.2d 118, 120 (2nd Dept., 1988)] For the

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misplaced as each of these cases involved the government-compelled forfeiture of one or more property rights. [*Manocherian, supra* (compelling landlords to provide renewal leases for rent-stabilized apartments to nonprivate hospitals for sublease to hospital employees); *Seawall Associates, supra,* (compelling landlords to refurbish and lease apartments at rent-controlled prices for an indefinite period); *Higgens, supra, for reasons stated in,* 164 A.D.2d 283 (expanding the class of persons entitled to succeed to the tenant-of-record's lease, and thereby compelling landlords to provide leases to such persons)]

same reason, plaintiff's contentions that its belated proposal for residential development of Bonnie Briar would serve the objectives of the ordinance just as well, are immaterial.

Moreover, whether or not they are the most efficient means which could have been employed, it can hardly be contended that the measures which the Town did adopt do not, in fact, substantially advance the ordinance's legitimate governmental goals. Obviously, the maintenance of open space, recreational resources and the suburban quality of the community, and the reduction of potential flood hazard, will be substantially advanced by measures which prohibit all – i.e., residential, commercial and industrial – but "recreational" development of, and incidental construction upon, existing open space and recreational resources such as country clubs – e.g., Bonnie Briar. Consequently, the relationship between Local Law #6-1994 and its putative objectives more than satisfies the standards applicable to the first prong of the takings analysis in the zoning ordinance context. [*Agins v. City of Tiburon*, 447 U.S. at 260-61 ("substantial relationship"); *Curtiss-Wright Corp. v. Town of East Hampton, supra* at 555-56 ("fairly debatable")] It is, therefore, indisputable that the Town's actions were also both rational and reasonably related to said objectives, and that plaintiff's constitutional right to due process of law was not violated thereby. [See *McMinn v. Town of Oyster Bay*, 66 N.Y.2d 544 (1985); *Beyda v. Board of Trustees of the Village of saddle Rock*, 207 A.D.2d 517 (2nd Dept., 1994)]

Plaintiff also argues that the enactment of Local Law #6-1994 and the amendment of the zoning map fails to satisfy the second prong of the *Agins* takings analysis –

i.e., depriving plaintiff of an economically viable use of his land – because it places the burdens associated with the promotion of the public interests to be served entirely upon the owners of the two (2) noncontiguous parcels which comprise the entire "R" district; thus, converting each parcel – including Bonnie Briar – into a Recreational Zone island surrounded by a sea of districts in which residential development is permitted and, "necessarily permanently preclud[ing] the use for which it is most readily adapted . . . " (*Vernon Park Realty, Inc. v. City of Mount Vernon, supra* at 499)

However, the designation of even a single plot in the center of a large zone devoted to a different use is not an invalid land use restriction if accomplished as part of a comprehensive plan [see, e.g., *Rodgers v. Village of Tarrytown*, 302 N.Y. 115 (1951); *Matter of Augenblick v. Town of Cortlandt*, 104 A.D.2d 806 (2nd Dept., 1984)], and the Town's efforts to maintain dwindling open space, protect the floodplain and preserve the suburban quality of the community are both rational and consistent with its basic land use policies. Its actions, therefore, do not violate the requirements of the enabling statutes (Town Law 261 and 263), and are not *ultra vires* [See *Mindel v. Village of Thomaston*, 150 A.D.2d 653 (2nd Dept., 1989); *McBride v. Town of Forestburgh*, 54 A.D.2d 396, 398 (3rd Dept., 1976)].

Neither is the creation of such an "island" unconstitutionally confiscatory, *per se*, if it is designed to promote the general welfare of the community [see, e.g., *Daurenheim, Inc. v. Town Board of the Town of Hempstead*, 33 N.Y.2d 468 (1974); c.f., *Stevens v. Town of Huntington*, 20 N.Y.2d 352 (1967)]. Nor does it constitute a compensable taking simply because, as plaintiff avers herein, the

restrictions imposed upon the designated parcel prohibit a particular use, more than one use, or the most appropriate or profitable use, to which the property is reasonably adapted. [See *Northern Westchester Professional Park Associates v. Town of Bedford*, 60 N.Y.2d 492 (1983); *Curtis-Wright Corporation v. Town of East Hampton, supra*]

Rather, in order to prevail, plaintiff,

> "must sustain a heavy burden of proof, demonstrating that under no *permissible use* would the parcel as a whole be capable of producing a *reasonable return* . . . "

[*Spears v. Berle*, 48 N.Y.2d 254, 263 (1979) (emphasis added); see also, *Matter of National Merritt, Inc. v. Weist*, 41 N.Y.2d 438 (1977); *Blitz v. Town of New Castle*, 94 A.D.2d 92 (2nd Dept., 1983)] But plaintiff alleges only, in conclusory fashion, that the ordinance, "deprives [it] of substantially all of its economic value of the Property" (Verified Complaint at p. 13, par. 62) Plaintiff does not allege: that Local Law #6-1994, "prohibits virtually all economically viable uses of the land" (*Tilles Investment Company v. Town of Huntington, supra* at 122); that its property is incapable of producing a "reasonable return" if put to any of the uses permitted in an "R" district[4], or; that the value of plaintiff's investment has been catastrophically diminished by the Town's actions (*Northern Westchester Professional Park Associates v. Town of Bedford, supra* at 501). Indeed, plaintiff would be hard-pressed to

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[4] Nor would the mere fact that only "recreational" uses are permitted necessarily preclude a finding that plaintiff's property is capable of producing a "reasonable" return. [See *Shukovsky v. Clavin*, 163 A.D.2d 919 (4th Dept., 1990)]

make such allegations – much less satisfy its burden of proof – given that the property has for decades been continuously and exclusively put to a use which is among the uses which Local Law #6-1994 permits, and there is no allegation that it has yet failed to produce a reasonable return.

While one who purchases property with knowledge that it is subject to a zoning restriction does not, thereby, forfeit the right to attack the restriction as unconstitutional [see *Chusud Reality Corp. v. Village of Kensington*, 22 A.D.2d 895 (2nd Dept., 1954)], the Court, "may not ignore the realities", of the use to which the property has, historically, been put (*Vernon Park Realty, Inc. v. City of Mount Vernon, supra* at 501-02, *Fuld, J., dissenting*). For more than seventy (70) years Bonnie Briar was located entirely within a district – i.e., "R-30" and "R-15" – in which residential development was permitted. Yet there is no allegation that any proposal for residential development was ever submitted before December, 1993, when the enactment of Local Law #6-1994 was all but inevitable. Such circumstances are hardly indicative that the use which had been *preferred* in the past is no longer "economically viable" simply because another use, to which the property had never been put, is no longer permitted. And even assuming, *arguendo*, that the elimination of the "possibility" for residential development has diminished the value of plaintiff's investment, there is nothing in plaintiff's submissions herein which indicates that, "all but a bare residue of its value", has been destroyed. [*Fred F. French Investing Company, Inc. v. City of New York*, 39 N.Y.2d 587, 596 (1976)]

Accordingly, for all of the foregoing reasons, there being no material or triable issue of fact upon the determination of which plaintiff would be entitled to the relief sought, plaintiff's motion for partial summary judgment is denied, defendant's cross-motion for summary judgment is granted, and the Zoning Ordinance of the Town of Mamaroneck as amended by Local Law #6-1994, and the amendment of the Zoning Map of the Town of Mamaroneck in accord therewith, are declared constitutional. [CPLR 3212(b); see also, *Cohen v. Vecchio,* 197 A.D.2d 499 (2nd Dept., 1993); *Town of Esopus v. State of New York,* 166 Misc 2d 36 (Court of claims, 1995); *Weingarten v. Town of Lewisboro,* 144 Misc 2d 849, 858-59 (S. Ct., Westchester County, 1989)]

The foregoing constitutes the decision, order and judgment of the Court.

Dated: White Plains, New York
July 3, 1996

/s/ Peter M. Leavitt
HON. PETER M. LEAVITT
Acting Justice of the Supreme Court

SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: PETER M. LEAVITT

----------x

BONNIE BRIAR SYNDICATE, INC.,

Plaintiff,

- against -

THE TOWN OF MAMARONECK, THE TOWN BOARD OF MAMARONECK, ELAINE PRICE, SUPERVISOR, KATHY O'FLINN, PAUL RYAN, VALERIE O'KEEFFE, and BARRY WEPRIN, AS MEMBERS OF THE TOWN BOARD,

Defendants.

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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order with notice of entry upon all parties.

Index No. 22037/94
Motion Date: 11/17/97

(Filed Jan. 6, 1998)

The following papers numbered 1 to 32 were read on this motion for summary judgment:

Notice of Motion/Affidavits/ Exhibits	1-22
Affidavits/Exhibits	23-28
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Upon the foregoing papers filed herein, it is ORDERED that this motion is disposed of as follows:

By decision and order entered July 3, 1996 – and affirmed on appeal to the Appellate Division, second Department (___ A.D.2d ___, 661 N.Y.S. 2d 1005) on June

10, 1997 – defendants' cross-motion for summary judgment on plaintiff's first, second, third, fourth, ninth and tenth causes of action was granted. Defendants now move for summary judgment on plaintiff's remaining causes of action. There being material and triable issues of fact to be determined concerning the remaining causes of action, defendants' motion is denied.

Counsel shall appear, as previously directed, at Chambers for a Compliance Conference at 10:30 a.m. on January 30, 1998, at which time the Court shall make a determination as to trial readiness.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
January 6, 1998

/s/ Peter M. Leavitt
PETER M. LEAVITT
Acting Justice of the
Supreme Court

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Local Law 6 – 1994 of the Town of Mamaroneck

RECREATION ZONE

1. Purpose: The Town Board recognizes that open space and recreational facilities within the Town of Mamaroneck are a rapidly diminishing resource of the community. Such open space and facilities are necessary in order to maintain the character of the Town of Mamaroneck as a suburban community and to reduce the adverse effects of over-building. In addition, the last remaining large areas of open space within the Town of Mamaroneck are located in areas of the Town where excessive construction could have severe, adverse impacts upon downstream properties as a result of storm water runoff. These open spaces are of sufficient significance so as to be listed on a County-wide inventory of open space.

   The Town of Mamaroneck, through its Local Waterfront Revitalization Program has recognized the significant interrelationship of development in a haphazard and unplanned manner and adverse environmental consequences for surrounding properties, particularly when those properties are located in watershed areas. The areas in question have been designated as Critical Environmental Areas by the Town's own local environmental laws and the Town's Master Plan has recognized the importance of protecting these areas.

   The purpose of this local law is to insure the maintenance of important open space and recreational resources within the Town, reduce the potential for substantial flood hazard and maintain the suburban quality of the community as a whole.

2. Section 89-4 of the Zoning Ordinance entitled "Districts Establishment" shall be amended by adding the following district: Recreation (R)

3. §89-5 is amended to reflect the changes set forth on the Zoning Map of the Town of Mamaroneck which are annexed hereto.

4. Add new §89-20.1 – Recreation (R) District

A. Principal Uses:

1. Private recreation facilities, including golf, tennis, and/or swimming clubs; along with clubhouses with accessory restaurants and catering facilities, used in conjunction with a recreational facility.

2. Other uses similar to those listed in the preceding paragraph, provided the Planning Board makes specific findings that the use is in full conformity with the purposes and intent of this zone district, all general and special requirements of the district and that the use has no greater impact upon open space, traffic, and drainage than any of the specifically enumerated uses.

B. Special Permit Uses:

1. Public playground or park, including golf, tennis, and/or swimming clubs. This provision shall apply to the Town in addition to any other municipal government or authority.

2.

a. Special Permits shall be issued by the Planning Board provided there is a finding that all general and special conditions are met.

b. The Planning Board shall require that no special permit is issued until a traffic study is conducted which demonstrates to the satisfaction of the Planning Board

that the proposed use shall not adversely impact upon traffic in the surrounding area, to a greater degree than any other Principal Use permitted in the zone.

C. Accessory Uses (when located on the same lot with the principal uses to which they are accessory).

1. Off street parking in accordance with §§89-63 through 89-66.

2. Cabanas, lockers, snack bars, and/or pro shops.

3. Maintenance sheds and/or garages.

4. Signs as provided in Article XIV of the Building Code.

5. Playing fields and courts for baseball, volleyball, basketball and similar sports.

6. Playgrounds and picnic areas.

7. No more than one residence for caretakers and staff of a recreational facility consisting of no more than ten (10) sleeping rooms or three (3) dwelling units.

8. Cross country skiing, sledding, ice skating and similar winter sports, however, winter sports using mechanized or motorized equipment is prohibited.

9. Child care facility limited to children of members or guests of the recreational facility, and used only while the members or guests are using the recreational facilities.

D. Special Requirements:

1. The Planning Board shall review the design of all site plans of properties located in this district:

   a. So as to preserve to the maximum extent possible wetlands, wetland control areas, flood hazard areas, designated Critical Environmental Areas, and other unique natural features, including but not limited to the highest crest of hills, natural rock outcroppings, and major tree belts;

   b. To insure that no construction takes place on areas which have slopes greater then 25 percent prior to any disturbance of the natural contours of the property or on wetland control areas. A slope shall be computed by taking a percentage in which the vertical distance is the numerator and the horizontal distance is the denominator calculated by measuring the vertical rise using two foot contours, in a thirty foot horizontal length;

   c. To minimize cut and fill, roads should follow natural topography wherever possible.

2. There shall be maintained a minimum of twenty (20) percent of the area of a parcel as a permanent open space. For the purposes of this section, permanent open space shall be an area exclusive of fairways, tees, greens or other areas of active recreational use, which shall be kept undisturbed and in its natural state, including areas designated as wetlands.

5. Add §89-35.1 Recreation (R) District.

A. Lot Requirements

1. Minimum lot area 50 acres.

2. Minimum lot width and length of street line frontage 300 feet. Minimum lot depth 500 feet.

3. Perimeter buffer area around the entire perimeter of the property, in which no court, pool, field, green, fairway, tee or structure may be placed, of no less than 40 feet in width. The Planning Board shall approve appropriate screening within the buffer area so as to minimize visual, sound and other impacts on adjacent property.

B. Yards, Courts, and Open Space

1. Minimum front yard 150 feet. On a corner lot a front yard should be provided on each street (see §89-44F). No parking may be placed in any required front yard.

2. Minimum side yard, 75 feet for each side yard.

Minimum rear yard 100 feet.

3. Principal and accessory uses are not permitted in required front yards.

4. Accessory uses require a minimum forty (40) foot rear yard and forty (40) foot minimum for each side yard.

C. Coverage

1. No principal buildings or combination of principal buildings on the site shall have

a coverage which exceeds 1 percent of the total area of the lot.

2. The total of all buildings shall not exceed an area of 1.25 percent of the total lot area.

D. Maximum Height

1. In stories, 2 1/2 stories; in feet, 35 feet.

E. Off street. Minimum number of off-street parking spaces; as required by sections 89-63 through 89-66.

F. Minimum off-street loading spaces: see section 89-70.

G. All permitted storage shall be entirely within a building except for parking and loading vehicles.

H. All lighting shall be located and shaded in a manner so that the light source itself is not visible beyond the boundaries of the lot on which it is located.

6. Add to §89-66 A.

Type of use	*Minimum requirements*
Private Golf Courses	two (2) parking spaces for each acre of land contained in the course
Public golf courses	2.5 spaces for each acre of land contained in the course
Public multiple use recreational facilities	2.5 spaces per acre on a course; one (1) space for every three (3) bathers in a swimming pool

Tennis public or private	three (3) spaces per court
Private swimming pools	one (1) space for each three (3) bathers
Soccer, football and baseball fields	ten (10) spaces for each field plus one (1) space for every five (5) spectator seats

7. Severablilty – Should any provision of this local law be declared unconstitutional or invalid by any court of competent jurisdiction, such declaration of unconstitutionality or invalidity shall not affect any other provisions of this local law which may be implemented without the invalid or unconstitutional provision.

MOTION FILED
MAR 2 3 2000

(2)

No. 99-1399

In The
SUPREME COURT OF THE UNITED STATES

BONNIE BRIAR SYNDICATE, INC.,

Petitioner,

v.

TOWN OF MAMARONECK, TOWN BOARD OF TOWN OF MAMARONECK, ELAINE PRICE, Supervisor, KATHY O'FLINN, PAUL RYAN, VALERIE O'KEEFE, and BARRY WEPRIN, as Members of the Town Board,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Of Counsel:
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March 23, 2000

22pp

MOTION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

The National Association of Home Builders ("NAHB") has received the written consent of the petitioner to submit this *amicus curiae* brief.[1] The letter of consent has been filed with the Clerk of this Court. Respondents have declined consent.

The NAHB respectfully moves this Court for leave to file its *amicus curiae* brief in support of petitioner because it wishes to bring to the Court's attention a disturbing trend exemplified by the petitioner's case and which quietly underlies many of this Court's takings cases involving land use regulation – the use of the zoning power to exclude needed housing once a builder or property owner, in good faith reliance on a municipality's master plan and zoning, submits a housing development application to that municipality. These municipalities, while uttering the environmentally correct words, are, in reality, simply enhancing their exclusivity by singling out and taking through regulatory means private property, zoned for housing use, without compensating for it. According due deference to municipal land use action should not equate with turning a blind eye to action tantamount to municipal bad faith.

The NAHB represents over 200,000 builder and associate members throughout the United States. Its

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[1] Pursuant to Rule 37.6 of this Court, *amicus* states that its counsel authored this brief and *amicus* paid for it. This brief was not written in whole or part by counsel for a party, and no one other than *amicus* made a monetary contribution to its preparation.

members include not only people and firms that construct and supply single family homes but also apartment, condominium, commercial and industrial builders, as well as land developers and remodelers. It is the voice of the American shelter industry.

The NAHB has appeared before this Court as an *amicus curiae* or as "of counsel" on behalf of the property owner in prior takings cases involving land use regulation. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas and Electric Co. v. City of San Diego*, 450 U.S. 621 (1981);[2] *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church of Glendale v. Los Angeles County,* 482 U.S. 304 (1987); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987);[3] *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687 (1999).

Gus Bauman

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[2] Justice Brennan's dissent cited approvingly the NAHB brief. 450 U.S. at 643 n.6.

[3] The Court opinion cited approvingly the NAHB brief. 483 U.S. at 840.

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SUMMARY OF ARGUMENT

The test for regulatory takings, which is loss of "economically viable use" or failure to "substantially advance legitimate state interests," is grounded in constitutional reason and Supreme Court precedent. The lower court, one with national influence in its rulings, chose to redefine the test by equating "substantial" with "reasonable," thereby enabling an exclusionary community to take private property for public use by destroying the owner's "distinct investment-backed expectations" (a takings standard articulated by this Court 22 years ago in another land use case in which the New York high court was rebuked for misinterpreting the Fifth Amendment).

This case, like eight other takings cases heard by this Court over the past score years, is really about the manipulation of zoning (and now the Constitution) to exclude needed housing. The justifications offered by the town for its action, which had nothing to do with preventing harmful use by the owner and everything to do with obtaining an open space resource for the town at no cost to anyone but the owner, were never accorded by the lower courts the searching factual inquiry required by this Court's decisions. A review of the remands of this Court's recent takings cases is instructive on the critical reason for having a trier of fact adjudge a takings claim.

REASONS FOR GRANTING THE WRIT

I.
THE COURT BELOW, BY EQUATING THE "SUBSTANTIAL ADVANCEMENT" TEST OF A TAKING TO MERE "REASONABLENESS," NOT ONLY VIOLATES THIS COURT'S RULINGS BUT ALSO MAKES EASY MUNICIPAL HOUSING EXCLUSION

Twenty years ago, in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), this Court, in a unanimous opinion, enunciated the test to which all takings jurisprudence in state and federal courts is supposed to adhere:

> The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land . . . .[1]

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[1] Below, the Bonnie Briar Syndicate indicated that this case does not implicate the second prong of the *Agins* test; thus, at issue here is exclusively the operation of the "substantial advancement" prong of *Agins*.

Since 1980, this Court has returned to this test in 1981,[2] 1985,[3] twice in 1987,[4] twice in 1992,[5] 1994,[6] and 1999,[7] each case building on the prior case, and each time stating that a zoning law must "substantially advance legitimate state interests" to avoid a taking. Moreover, since 1980, this Court has neither applied nor countenanced a different formula or altered the basic test, except to clarify in the context of governmental exactions of private property interests that a municipality must demonstrate "rough proportionality" between an imposed exaction and the impact of the proposed development. *See Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994); *Ehrlich v. Culver City*, 19 Cal. Rptr.2d 468 (Cal. Ct. App. 1993), *vacated and remanded*, 512 U.S. 1231 (1994); *City of Monterey v. Del*

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[2] *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 647 (1981) (Brennan, dissenting) (but representing the substantive views of five members of the Court).

[3] *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985).

[4] *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 836 n.3 (1987).

[5] *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992).

[6] *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994).

[7] *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S. Ct. 1624, 1636 (1999).

Monte Dunes at Monterey, 526 U.S. 687, 119 S. Ct. 1624, 1635 (1999).

By articulating the taking test to require "substantial advance[ment]," this Court consciously encapsulated a "verbal formulation" different from the "rational basis review" applied as the least stringent standard applicable under due process analysis.[8] In *Nollan v. California Coastal Commission*, this Court stated that "our opinions do not establish that [takings] standards are the same as those applied to due process or equal protection claims." 483 U.S. 825, 836 n.3 (1987). Rather, this Court explained, "our cases describe the condition for abridgement of property rights through the police power as 'substantial advanc[ing]' of a legitimate state interest." *Id.* at 841. Thus, this Court's jurisprudence is crystal clear on this point: takings claims are constitutionally different from due process or equal protection claims, and should not be analyzed through the rational basis lenses of those doctrines.

In *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, 94 N.Y.2d 96 (1999), the New York Court of Appeals simply ignored this Court's consistent rulings. By doing so, it was then able to deny the injured land owner its day in court to prove its case. The New York court fashioned a takings test requiring that zoning regulations be merely "reasonable," ruling that anything found "reasonable" then also meets the "substantial advancement" test. *Id.* at 108.

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[8] *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 836 n.3 (1987).

It said: "Because zoning plaintiff's property for solely recreational use bears a reasonable relation to the legitimate objectives stated within [Local Law No. 6], the regulatory action here substantially advances those purposes". *Id.* This Orwellian reading of this Court's specific language – substantial equals reasonable – goes beyond the confusion some other state courts express when applying the "substantial advancement" test.

For example, in *Department of Natural Resources v. Indiana Coal Council, Inc.*, 542 N.E.2d 1000 (Ind. 1989), the Supreme Court of Indiana expressed the basis for such confusion when ruling on a state mining law preventing surface mining that might impact archeological resources. Reviewing the menu of choices provided under modern takings jurisprudence, the Indiana court stated:

> [T]here is authority that suggests that a land use regulation need only be "reasonably related" to the legitimate state interests to be valid, *Penn Central*, 438 U.S. 104, 131 [], or that it be "reasonably necessary to the effectuation of a substantial public purpose," *Penn Central*, 438 U.S. at 127 [], or that it "substantially advance" a legitimate state interest, *Agins*, 447 U.S. 255, 260 []. The Supreme Court has, as yet, been unable to settle on an exact standard for assessing the connection between the regulation and the state interest.

542 N.E.2d at 1005. The Indiana court prefaced its comments above by stating: "In examining the nexus between the land use regulation and the state interest, we have relied on the phrasing of earlier Supreme Court cases, and have required that there be a 'substantial relationship' between the two." *Id.*

In *Bormann v. Board of Supervisors*, 584 N.W.2d 309, 316 (Iowa 1998), a takings case involving the adoption of an agricultural district, the Supreme Court of Iowa recently misunderstood the regulatory takings test, reciting a "reasonableness" standard in the same confused manner as the New York court did in *Bonnie Briar*. In so doing, the Iowa court managed to discuss the law of takings without ever referring to the alternative prong of the *Agins* test, the "substantial advancement" prong.

Since this Court first confronted the constitutional problem presented by inverse condemnation in *Agins*, a remarkable number of its regulatory takings cases have, at heart, concerned housing exclusion: *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S. Ct. 1624 (1999). These cases almost without

exception were about use of the police power to obtain open space or very low density in exclusive suburban communities despite what the zoning permitted and despite federal tax and mortgage policies encouraging new housing for a growing nation. Such housing exclusion is precisely what occurred in *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, and it is precisely what the New York court condoned by taking this Court's constitutional standard for evaluating a taking and twisting it.

The wrong takings jurisprudence applied by the New York Court of Appeals, and exhibited elsewhere as well, fosters this type of housing exclusion nationwide.[9] When courts misapply takings law, as here, the door opens wide for municipalities to engage in behavior designed not for the advancement of legitimate and laudable environmental goals but for behavior designed to exclude new homes and people.

Land use behavior tainted by municipal bad faith has been the subject of this Court's recent attention in *Del Monte Dunes* as well as *Village of Willowbrook v. Olech*, 120 S. Ct. 1073 (2000), an equal protection case. Similarly, in the recent *Forseth v. Village of Sussex*, 199 F.3d 363 (7th Cir. 2000), the court reversed a district court's dismissal of equal protection claims in the context of land use. In *Forseth*, the landowner alleged that the village board unconstitutionally

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[9] *See generally* Advisory Comm'n on Regulatory Barriers to Affordable Housing, *"Not In My Back Yard" – Removing Barriers to Affordable Housing*, at 2-5 (1991); Report of the President's Comm'n on Housing, at 199-208 (1982).

conditioned approval of an as-of-right development project upon the landowner's sale of a portion of the property to the village board president personally. *Id.* at 366-67. The court remanded the case.

One purpose in formulating a takings standard different from the "rational basis" standard of due process analysis, in both kind and degree, was to smoke out bad faith by requiring more than the abstract possibility of a rational basis for application of a zoning law. Here, where close examination of the town's stated rationales for what it did does not survive even cursory scrutiny, *see Reason II. below*, the underlying objective of the Town of Mamaroneck becomes clear: to exclude new housing (therefore people) at the singular expense of the Bonnie Briar Syndicate's use of its land, keeping it in open space for the benefit of the neighbors and town and at no cost to anyone but for the targeted landowner.

Conflicting application of takings law simply encourages litigation, harms consumers by increasing housing prices, decreases liquidity in the real estate development markets, and is fundamentally unfair and unconstitutional.

II.
DESPITE THIS COURT'S CLEAR RULINGS THAT TAKINGS CLAIMS REQUIRE AD HOC, FACT SENSITIVE INQUIRIES, THE COURT BELOW REDEFINED TAKINGS ANALYSIS THEN DISMISSED THE CASE WITH NO SEARCHING INQUIRY, DESTROYING THE OWNER'S "DISTINCT INVESTMENT-BACKED EXPECTATIONS"

The court below, after redefining this Court's test for a regulatory taking, then dismissed the takings claim of the Bonnie Briar Syndicate on motions for summary judgment; no trial ever took place. Yet, since *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), this Court has repeatedly stressed the "essentially ad hoc, factual" nature of takings claims and the importance of trial. *Id.* at 124. For example, in *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987), this Court reversed and remanded.[10] In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court reversed and remanded.[11] In *Dolan v. City of Tigard*,

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[10] On remand, the state appeals court found no taking under both prongs of the *Agins* test. 258 Cal. Rptr. 893 (Cal. Ct. App. 1989).

[11] On remand, the state supreme court found a taking and ordered a trial. 424 S.E.2d 484 (S.C. 1992). The state then settled with David Lucas, bought the property it tried to keep from being developed, and then auctioned the property to the highest bidder for development. H. Jane Lehman, *Accord Ends Fight Over Use of Land*, Wash. Post,

(continued...)

512 U.S. 374 (1994), this Court reversed and remanded.[12] And in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), this Court reversed and remanded.[13]

As recently as last term, this Court in *Del Monte Dunes* addressed the role of the trier of fact and reiterated the fact-bound nature of takings claims, stating:

> Almost from the inception of our regulatory takings doctrine, we have held that whether a regulation of property goes so far that "there must be an exercise of eminent domain and compensation to sustain the act . . . depends upon the particular facts." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922); *accord Keystone Bituminous Coal*, [480 U.S.] at 473-74. Consistent with this understanding,

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[11] (...continued)
July 17, 1993, at E1.

[12] On remand, during jury trial in state court, the city settled with Florence Dolan for $1.5 million, granting her a building permit in exchange for two property easements. No. 94-1259-CV (Or. Cir. Ct. Nov. 18, 1997).

[13] On remand, in denying the agency's summary judgment motion, the federal district court indicated a likelihood of finding a taking. No. CV-N-91-040-ECR (D. Nev. Dec. 9, 1998). The agency then settled the case before trial, paying Bernadine Suitum for her property and costs in exchange for her agreement that the district court opinion and order be withdrawn. *Suitum Settles Longstanding Takings Case*, Endangered Species & Wetlands Report, June 1999, at 7.

> we have described determinations of liability in regulatory takings cases as "'essentially ad hoc, factual inquiries,'" *Lucas*, [505 U.S.] at 1015 (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)), requiring "complex factual assessments of the purposes and economic effects of government actions," *Yee*, 503 U.S. at 523.

119 S. Ct. at 1644.

Here, all three of the town's stated objectives – recreational opportunities, open space, and flood control – when confronted with the landowner's "distinct investment-backed expectations" (a takings standard first enunciated in *Penn Central*, 438 U.S. at 124) and submitted development application, present clear factual issues requiring trial. Neither the town's stated objectives nor the landowner's takings claim were suited for summary disposition.

The town singled out and downzoned the Bonnie Briar property based in part on the town's claim that it sought to provide Mamaroneck citizens with recreational opportunities. Did the downzoning substantially advance the town's recreational opportunity rationale? No. Bonnie Briar has operated the sought-after recreational opportunity since 1921 and has never hinted that it would cease providing this recreational opportunity. Indeed, when the town was presented with the opportunity to convert this private golf club into a public course operated for the benefit of all the town's residents, the town declined to substantially

advance its citizens recreational opportunities, opting instead to downzone Bonnie Briar for open space. Moreover, the development plan submitted by the owner contemplated no alteration in the recreational opportunities; rather, the plan submitted to the town conformed with the town's own comprehensive plan by retaining the golf course.

The town's second rationale – retention of open space – suffers from the same failures: the downzoning did not substantially advance the state interest of retaining open space. The owner's residential application would retain the entire 18-hole golf course and construct housing on a fifth of the total property, in conformance with the zoning, the town master plan, and the recommendations of the town's consultant.

The town's final rationale – use of Bonnie Briar's land for a municipal flood control device – seems the most outrageous and the least suited for summary disposition. Having failed to provide appropriate flood control measures using more traditional methods (where the whole community bears the cost), the town baldly offers as one of its objectives that it intends to use Bonnie Briar's privately owned land for this public purpose. Thus the town applied a zoning provision for the *express* purpose of appropriating Bonnie Briar's property (without compensation) during times of flooding, an action especially egregious since the owner did nothing to contribute to the flooding.

Clearly, reasonable deference must be accorded municipal actions in land use regulation. But, as this Court

noted in *Del Monte Dunes*, 119 S. Ct. at 1637, deference does not mean that municipalities are immune from searching inquiry when a citizen claims constitutional injury. This Court made the same important point in both *Lucas*, 505 U.S. at 1031-32, and *Dolan*, 512 U.S. at 392.

While a trier of fact certainly might determine that the town's rationales for what it did to Bonnie Briar constitute the required substantial advancement of legitimate state interests, in *Bonnie Briar*, no trier of fact ever heard the disputed evidence. If the lower court opinion by the influential New York Court of Appeals is allowed to stand, despite what this Court has said consistently since *Penn Central* (when this Court rebuked the New York high court for misinterpreting the law of regulatory takings), then no owner or builder with an as-applied takings claim has much chance of being allowed to try to prove its case.

CONCLUSION

For the above reasons, the *amicus* respectfully requests that this Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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No. 99-1399

In the

Supreme Court of the United States

BONNIE BRIAR SYNDICATE, INC.,
Petitioner,

v.

THE TOWN OF MAMARONECK, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeals, State of New York

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Can a town constitutionally solve preexisting general municipal drainage and flooding problems (and satisfy desires for open space) by zoning one property owner's land to be a de facto catch basin for waters diverted from elsewhere in the town? Does that take the affected owner's property for public use without compensation by singling out the aggrieved landowner alone to bear community-wide burdens?

2. This Court has held that a Fifth Amendment taking of property occurs when a land use regulation "fails to substantially advance legitimate state interests." What legal criteria determine whether such a regulation passes or fails that test? Specifically, is regulation that "substantially advance[s] legitimate state interest" synonymous with that which is merely "reasonable," as the court below held?

3. Can a municipality destroy a property owner's constitutionally protected "distinct investment-backed expectations" for using land simply by asserting that there is a *reasonable* relationship between its regulatory destruction of those expectations and its ostensible goal, where evidence would show that such destruction is not *necessary* to achieve the goal?

4. Can a land use regulation be declared valid *as a matter of law*, thus depriving the property owner of the right to a trial on the merits, when disputed facts underlie the municipality's assertion of a constitutionally valid connection between the regulation's means and its ostensible ends?

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.3, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the Petition for Writ of Certiorari.[1] Written consent for amicus participation in this case was granted by counsel of record for Petitioner Bonnie Briar Syndicate, Inc. Consent was withheld by Respondent Town of Mamaroneck, *et al.*

Pacific Legal Foundation is a nonprofit public interest legal foundation that specializes in defending property rights and other individual liberties. Since its inception 26 years ago, PLF has had extensive litigation experience in cases involving individuals adversely affected by government regulation of private property.

Attorneys for Pacific Legal Foundation have represented other property owners before this Court when regulatory agencies have taken rights in property without the payment of just compensation, *see, e.g., Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and have participated as amicus curiae in almost all of the major Takings Clause cases before this Court in the past 20 years. *See Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 564 U.S. 687, 119 S. Ct. 1624 (1999). Pacific Legal Foundation attorneys are also currently representing Claude and Micheline Lambert in a petition for certiorari before this

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

Court in *Lambert v. City and County of San Francisco*, Supreme Court Docket No. 99-697, another case in which an appellate court denied a property owner relief for a regulatory taking. Because of the Foundation's experience in the field of regulatory takings, it can add a unique perspective that will assist this Court's consideration of this case.

PLF seeks to augment the arguments of Petitioner by providing additional information regarding the split of authority among the lower courts on the issues presented by this case. PLF believes its public policy perspective and litigation experience dealing with the issues involved will provide a unique viewpoint on the issues presented in this case. PLF believes this viewpoint will aid this Court in evaluating the merits of the Petition.

For the reasons stated above, Amicus respectfully requests that this Court GRANT Amicus' motion for leave to file this brief.

DATED: March, 2000.

Respectfully submitted,

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STATEMENT OF THE CASE

When Bonnie Briar Syndicate, Inc. (Petitioner), decided to build homes on land that had been residentially zoned for 73 years, the Town of Mamaroneck (Respondent) suddenly decided that the land would be more valuable to the community as recreational open space and as a stormwater catchment basin. This case raises the question of what level of constitutional scrutiny should be applied to a zoning ordinance which strips a property owner of its right to develop ***any*** of its property.

Bonnie Briar Syndicate, Inc., owns 150 acres of land in the Town of Mamaroneck. Since 1921 this property has been used as a golf course. From 1921 until 1994 the property was zoned for residential use, allowing for homes on lots of 15,000 and 30,000 square feet. In 1994, the Town Board rezoned the property for exclusive recreational use, stripping the Petitioner of its ability to construct any homes on the 150 acre parcel.

Months before the rezoning occurred, Petitioner submitted a Preliminary Subdivision Plan to the Town Board. This plan contemplated the construction of 71 single-family homes, leaving 112 acres for the 18-hole golf course. The Board rejected this plan and rezoned the property for exclusive recreational use. The Board did so in order to achieve three separate goals. First, denying the Petitioner the ability to build any homes on the 150 acre lot would preserve open space. Second, this restriction would provide recreational opportunities.[1] Third, the restriction would mitigate flooding of coastal and flood plain areas.

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[1] The development proposed by Petitioner contemplated the construction of 71 residential homes, leaving 112 acres of open space on the existing 18-hole golf course site. The court below makes no attempt to explain how the construction of homes near the golf course would somehow diminish recreational opportunities.

Petitioner filed suit alleging that the Town's rezoning of its property constituted a regulatory taking of private property without just compensation. The Supreme Court and the Appellate Division rejected this claim. The Court of Appeals of New York was then called upon to address the issue of the appropriate standard of review to be applied in a regulatory takings case which does not require a dedication of land.

Relying on this Court's decision in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S. Ct. 1624 (1999), the Court of Appeals held that the "rough proportionality" test of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), was inapplicable in cases where the landowner's challenge is not based on excessive exactions, but on the denial of development. *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, 94 N.Y.2d 96, 107, 699 N.Y.S.2d 721, 725 (1999). The court further held that the "essential nexus" test set forth in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), was also inapplicable outside the context of challenges to governmental regulations or actions where a dedication of property is demanded in exchange for the right to develop. *Briar*, 94 N.Y.2d at 107, 699 N.Y.S.2d at 725. After shunning both the "rough proportionality" test and the "essential nexus" test, the court applied the "reasonable relation" standard to the Town's restriction on Petitioner's ability to develop the parcel. The court concluded that zoning the property for solely recreational use bore a reasonable relation to the government's interest in preserving open space, preserving recreational activities, and flood control. *Id.* at 108, 699 N.Y.S.2d at 726.

REASONS FOR GRANTING THE WRIT

SUMMARY AND INTRODUCTION

The Town of Mamaroneck decided that sterilizing the development rights of Bonnie Briar Syndicate's property would serve the City's goals of having lots of open space,

land for recreation, and even a natural basin for stormwater overflow. But is the mere recitation of public goals that will allegedly be advanced by a severe restriction on property enough to insulate a town from *meaningful* scrutiny under the Takings Clause? This Court should grant the Petition for Writ of Certiorari in order to elucidate the proper standard of review to be applied in a regulatory takings case which does not involve dedications or exactions. In the last two decades this Court's regulatory takings jurisprudence has evolved at an accelerated rate. Although this Court's recent jurisprudence has demystified much of this area of the law, lower courts continue to struggle with the standard of review to be applied in cases which do not involve dedications or exactions. In fact, last term this Court explicitly recognized that this issue had not yet received a "thorough explanation." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S. Ct. at 1636.

The absence of a "thorough explanation" has created a nationwide patchwork of inconsistent lower court decisions. As lower courts continue to grapple with this issue, the split of authority among these courts is exacerbated. The case at bar represents the latest attempt by a court to determine the appropriate standard of review to be applied in a regulatory takings challenge to a restriction on the use of private property that does not involve a governmental demand of a dedication or exaction. The court below read this Court's precedent as requiring it to eschew both the rough proportionality and the essential nexus tests and to apply a standard of review akin to rational basis to all takings cases which do not involve a dedication or exaction. Although this holding is at odds with this Court's jurisprudence (*see Agins v. City of Tiburon*, 447 U.S. 255 (1980), and *Yee v. City of Escondido*, 503 U.S. 519 (1992)), this erroneous interpretation of the Takings Clause is not unique. Other lower courts have required governmental encroachments

upon Fifth Amendment rights to survive a more rigorous level of scrutiny, even outside the context of dedications and exactions. This Court should grant the Petition for Writ of Certiorari in order to a provide a "thorough explanation" of the proper standard of review and give much needed guidance to the lower courts on this important question of constitutional law.

I

THIS COURT SHOULD GRANT THE WRIT TO REINFORCE THE PROPER STANDARD OF REVIEW FOR TAKINGS CASES

The New York Court of Appeals has decided that the Fifth Amendment to the United States Constitution requires only that a governmental decision to deny a property owner the right to develop land, thereby restricting it to recreational use, bear a "reasonable relation" to the government's stated objective. *Bonnie Briar*, 94 N.Y.2d at 108, 699 N.Y.S.2d at 726. This important question of federal constitutional law has generated a great deal of confusion among the lower courts. Although this Court has articulated a standard of heightened scrutiny to be applied by lower courts when evaluating whether the Fifth Amendment is violated, lower courts nonetheless remain perplexed as to how to apply that standard or, as in this case, whether to apply it at all.

A. This Court's Regulatory Takings Jurisprudence Provides Standards for Determining the Constitutionality of Land Use Regulations

The Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. This Court has long recognized that a regulation which interferes with the rights of property owners can effect a taking if that regulation goes "too far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("The general rule at least is, that

while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."). Justice Holmes' statement of the "general rule" has been identified as the "genesis of the so-called regulatory takings doctrine." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 540 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992)).

In *Agins v. City of Tiburon*, 447 U.S. 255, this Court provided an analytical framework for determining whether a regulation had gone too far. As this Court explained, "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land." *Agins*, 447 U.S. at 260 (citations omitted).

The "substantial advancement" prong of this test was revisited and further refined by this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825. *Nollan* involved a challenge to the government conditioning the granting of a building permit on the property owners' willingness to grant a public easement across their property. *Nollan*, 483 U.S. at 828. This Court explained that such regulations could not weather constitutional attack by merely referencing a "rational relationship" to the asserted objectives:

> [O]ur opinions do not establish that [takings] standards are the same as those applied to due process or equal protection claims. To the contrary . . . [w]e have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, not that "the State '*could rationally have decided*' that the measure adopted might achieve the State's objective."

Nollan, 483 U.S. at 834 n.3 (citations omitted; emphasis in original). Thus, the regulatory decision (whether a denial or a grant of the permit subject to conditions) must bear an "essential nexus" to a legitimate state interest. *Id.* at 837.

Where *Agins* and *Nollan* involved the standard of review for regulatory decisions to deny or condition a permit, *Dolan v. City of Tigard*, 512 U.S. 374, established the standard for reviewing the *scope* of any conditions imposed. This Court ruled that the conditions imposed must be "roughly proportional" to the impact of the proposed development. *Id.* at 391.

Because both *Nollan* and *Dolan* involved regulations under which the local government had required the dedication of real property in exchange for the necessary development permits, lower courts (and some commentators) have erroneously conflated the analysis of the two cases. This has led some to argue that the two very different tests discussed in those decisions apply *only* in cases of permit conditions involving exactions. This has created much confusion in the lower courts.

B. This Court Should Grant Review in This Case to Reaffirm That Heightened Scrutiny Is the Proper Standard of Review to Determine Whether a Permit Denial Constitutes a Regulatory Taking

Lower courts have split over the question of whether the *Agins/Nollan* standard of heightened scrutiny should be applied outside the context of dedications. That *Nollan* applies beyond the context of cases requiring a dedication of land should not be a question. *Nollan's* footnote three, which dictates that heightened judicial scrutiny be employed in takings cases, is merely an explanation of the test first established by this Court in *Agins v. City of Tiburon*. *Agins*, of course, did not involve a dedication of land but was a

challenge to the city's zoning ordinances. *Agins*, 447 U.S. at 257. Despite the fact that the heightened scrutiny test was established in a case challenging zoning ordinances, lower courts have been reluctant (sometimes tenaciously so) to apply this test outside the context of dedications and exactions.[2]

Despite this Court's pronouncements in *Agins* and *Yee* regarding the scope of the substantial advancement test, lower courts have expressed confusion over this area of the law. As the United States District Court for the District of Nevada recently explained in a case challenging a series of ordinances which severely restrict (and often prohibit) the development of certain parcels in the Lake Tahoe Basin, "there is as yet no clear test for determining whether a regulation substantially advances a legitimate state interest–at least in the type of situation involved here." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 34 F. Supp. 2d 1226, 1239 (D. Nev. 1999).

That court further noted that there had been no indication from this Court as to whether the "essential nexus" test announced in *Nollan* and the "rough proportionality" test announced in *Dolan* should be exported beyond those cases in which the government sought the concession of property from landowners.

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[2] This Court has, however, indicated that the *Agins/Nollan* heightened scrutiny analysis is applicable outside the context of dedications and exactions. In *Yee v. City of Escondido,* this Court upheld a mobile home rent control ordinance against a physical takings challenge. In the course of that opinion, Justice O'Connor explained that the effect of the regulation "might have some bearing on whether the ordinance causes a regulatory taking, as it may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance." *Yee*, 503 U.S. at 530.

> The Supreme Court has developed a test to make this determination in its "unconstitutional exactions" cases, *Dolan v. City of Tigard* and *Nollan v. California Coastal Commission*–the "essential nexus"/"rough proportionality" test. That is, first it must be determined "whether the 'essential nexus' exists between the 'legitimate state interest' and the permit condition exacted by the city," *Dolan*, 512 U.S. at 386 (citing *Nollan*, 483 U.S. 825, 837 (1987)), and then whether some "rough proportionality" exists between the condition exacted and the "impact of the proposed development." 512 U.S. at 390-91. ***Aside from one footnote in Dolan, these cases do not really indicate whether this test should also be applied to situations in which no concession is being sought by the government in return for the grant of a permit to a specific individual.***

Tahoe-Sierra Preservation Council, Inc., 34 F. Supp. 2d at 1239 (emphasis added).

Federal courts of appeals have also wrestled with how to apply this Court's regulatory takings jurisprudence outside the context of dedications. "This test has been restated and reapplied many times, but it is still not refined with precision." *Dodd v. Hood River County*, 136 F.3d 1219, 1228 (9th Cir. 1998). "How to determine whether a regulatory taking has occurred is the subject of ongoing debate." *Florida Rock Industries v. United States*, 18 F.3d 1560, 1564 (Fed. Cir. 1994).

This Court, however, has been its own harshest critic in recognizing the confusion that exists regarding the current state of takings jurisprudence.

> Without denigrating the importance the regulatory taking concept has assumed in our law, it is fair to

> say it has proven difficult to explain in theory and to implement in practice. Cases attempting to decide when a regulation becomes a taking are among the most litigated and perplexing in current law.

Eastern Enterprises v. Apfel, 118 S. Ct. at 2155 (Kennedy, J., concurring in the judgment and dissenting in part) (citing *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 123 (1978); *Kaiser Aetna v. United States,* 444 U.S. 164, 175 (1979)).

Last term this Court had occasion to decide a regulatory taking case in which no concession of property was demanded by the government. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 119 S. Ct. 1624. That case required this Court to address the constitutionality of a city's numerous denials of a landowner's application to develop a parcel of land. Because the case involved a permit denial, rather than a condition, this Court ruled that the "rough proportionality" test of *Dolan* (used to measure the proper scope of permit conditions) was "inapposite." *Del Monte Dunes,* 119 S. Ct. at 1635. The Court in *Del Monte Dunes* failed, however, to specifically articulate the standard of review to be applied in cases involving permit denials.[3] As this Court explained, it has "provided neither a definitive statement of the elements of a claim for a temporary regulatory taking nor a thorough explanation of the nature or applicability of the requirement that a regulation substantially advance legitimate public interests outside the context of required dedications or exactions." *Del Monte Dunes,* 119 S. Ct. at 1636.

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[3] Indeed, the Court specifically declined suggestions that it revisit the heightened scrutiny requirement set out in *Agins* and *Yee*. *Del Monte Dunes*, 119 S. Ct. at 1636.

Unfortunately, as the decision below illustrates, this latest discussion of the regulatory takings doctrine has left the lower courts confused. The court below interpreted this Court's explicit refusal to revisit the standard of review as set forth in the prior decisions in *Agins* and *Nollan* as a *sub silentio* rejection of the "essential nexus" test outside the context of cases involving a dedication of land. *Bonnie Briar*, 94 N.Y.2d at 107, 699 N.Y.S.2d at 725. Commentators have noted that the opposite conclusion is logically implicit in the Court's singling out of the *Dolan* "rough proportionality" test, while making no mention of the applicability of *Nollan's* "essential nexus" test. "One could also argue, even after *Del Monte Dunes*, that it is merely *Dolan's* 'rough proportionality' test, rather than *Nollan's* heightened scrutiny generally, that is 'inapposite' outside of the exactions context." Brett Christopher Gerry, *Parity Revisited: An Empirical Comparison of State and Lower Federal Court Interpretations of Nollan v. California Coastal Commission*, 23 Harv. J.L. & Pub. Pol'y 234, 280 n.150 (1999). *Accord*, Douglas W. Kmiec, *The "Substantially Advance" Quandary: How Closely Should Courts Examine the Regulatory Means and Ends of Legislative Exactions?*, 22 Zoning and Planning L. Rep. 97 (1999). Although this latter conclusion is consistent with the Court's decision in *Agins* and *Yee*, the decision below demonstrates that this reasoning will not be embraced by every court that is presented with the issue. By singling out *Dolan's* "rough proportionality" test, without mentioning the applicability of *Nollan's* heightened scrutiny test, commentators, and far more importantly lower courts, will certainly split on the issue of whether any degree of heightened scrutiny is to be applied in cases falling outside of the exaction and dedication context.

According to the court below, once the government is freed from the strictures of *Dolan* ***and*** *Nollan* the Fifth Amendment requires only that the regulation in question bear

a "reasonable relation" to a legitimate government interest. *Bonnie Briar*, 94 N.Y.2d at 108, 699 N.Y.S.2d at 726. As this Court explained in *Dolan*, the term "reasonable relation" bears an uncomfortable resemblance to the highly deferential (almost nonexistent) rational basis standard of review. *Dolan*, 512 U.S. at 391. The application of this standard of review is at odds with the central teaching of *Agins* and *Nollan* that the constitutionally imposed requirement that a regulation "substantially advance" a "legitimate state interest" means something different (and more) than rational basis review. *Agins*, 447 U.S. at 260; *Nollan*, 483 U.S. at 834 n.3. This Court in *Nollan* made clear that the standards to be applied in takings cases are "quite different" than the standards to be applied to due process and equal protection claims. *Id.* The confusion generated since *Nollan* has caused the court below to drop the standard of review in nondedication takings cases to the basement of constitutional analysis, making it no different than the standards which are applied in due process and equal protection claims. This reasoning is at odds with the central holding of *Nollan*.

The lower court's reading of *Del Monte Dunes* is also at odds with the purpose of the Fifth Amendment. One of the principle purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). "The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest." *Agins v. City of Tiburon*, 447 U.S. at 260.

The Town of Mamaroneck has singled out Petitioner's golf course to advance such undeniably public interests as the preservation of open space, flood control, and the preservation of recreational activities. *Bonnie Briar*,

94 N.Y.2d at 104, 699 N.Y.S.2d at 723. The highly deferential "reasonable relation" standard of review employed by the court below merely rubber stamps the Town's decision to conscript Petitioner's property to achieve public goals. The absence of searching judicial review gives the government *carte blanche* to enact regulations which force some individuals alone to bear burdens which should be borne by the public as a whole, so long as those regulations do not require the dedication of real property. The standard of review adopted and applied by the lower court essentially eviscerates the central purpose of the Takings Clause and, in cases which do not require a dedication of property, relegates the Takings Clause to the status of a "poor relation" to the rest of the Bill of Rights. This Court should grant review to provide a much needed "thorough explanation" of the requirement that a regulation "substantially advance legitimate public interests outside the context of required dedications or exactions." *Del Monte Dunes*, 119 S. Ct. at 1636.

II

THIS COURT SHOULD GRANT THE PETITION TO RESOLVE THE CONFLICT AMONG THE LOWER COURTS REGARDING THE PROPER LEVEL OF SCRUTINY TO BE APPLIED IN TAKINGS CASES WHERE THE GOVERNMENT DOES NOT REQUIRE A DEDICATION OR EXACTION OF LAND IN EXCHANGE FOR A PERMIT

Supreme Court Rule 10 provides that a petition for writ of certiorari may be granted in order to resolve a conflict between a state court of last resort and another state court of last resort or a United States Court of Appeals. The decision below does not create such a conflict, it merely adds to a preexisting conflict of authority among lower state and federal courts. This Court should grant the writ to resolve this

conflict on the meaning and scope of the Fifth Amendment to the United States Constitution.

The court below concluded that *Nollan's* heightened scrutiny requirement was inapplicable in a takings challenge to the Town's decision to prohibit Petitioner from building on its property. *Bonnie Briar*, 94 N.Y.2d at 107, 699 N.Y.S.2d at 725. Unfettered by *Nollan's* requirement that some causal nexus be demonstrated, the Town was free to conscript the property for recreational use and flood control based on a showing that the zoning was reasonably related to those government interests. This decision is at odds with the decisions of other courts and only serves to further muddle an already very confused area of the law.

The confusion among lower courts is illustrated by, although certainly not confined to, the conflict of authority which has developed between the Ninth Circuit Court of Appeals and California state courts. "[T]he Ninth Circuit has read *Nollan* unusually broadly, while the California courts rarely have applied *Nollan* outside of the physical exactions area." Gerry, *supra*, at 289.[4] This discrepancy between federal and state court interpretations of the Takings Clause and the application of *Nollan* is best demonstrated by a recent series of cases involving the constitutionality of rent control laws.

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[4] The author also notes that the tension between state court and federal court interpretations of *Nollan* exists between New York state courts and the Second Circuit Court of Appeals. New York state courts have applied *Nollan's* "essential nexus" test to strike down unconstitutional rent control ordinances. *Seawall Associates v. City of New York*, 542 N.E.2d 1059, 74 N.Y.2d 92, *cert. denied*, 493 U.S. 976 (1989); *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479, 84 N.Y.2d 385 (1994). The Second Circuit Court of Appeals, on the other hand, has been far more restrictive in its application of *Nollan*. *St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990).

Richardson v. City and County of Honolulu, 124 F.3d 1150 (9th Cir. 1997), involved a challenge to a Hawaii ordinance that regulated property on which condominium units were built. The ordinance limited the increases in ground rent that the owner of the land on which the condominiums were built could charge. *Richardson*, 124 F.3d at 1163. The ordinance required no dedication or exaction of land. Nevertheless the Ninth Circuit applied *Nollan* and found that the ordinance failed to substantially advance a legitimate government interest.

> Land use regulations do influence the value of property, but to be constitutional, they must do so in a manner that substantially furthers a legitimate government interest. *Nollan*, 483 U.S. at 834. Ordinance 91-96 does not do this. It regulates the use of the lessors' property interests in a manner that does not substantially further the goal of creating affordable owner-occupied housing . . . . The Ordinance thus effects a regulatory taking.

Richardson, 124 F.3d at 1165-66.

The reasoning of the Ninth Circuit is at odds with the decision rendered by the court below. Whereas the Ninth Circuit has interpreted *Nollan* to apply outside the context of dedications and exactions (and, in fact, has interpreted *Nollan* to require the invalidation of a rent control ordinance), the court below has severely limited *Nollan's* reach. The Ninth Circuit's reasoning has also been, expressly, disavowed by California state courts.

The California Supreme Court has explained that *Nollan's* heightened scrutiny requirement is inapplicable in cases involving rent control or other generally applicable land use restrictions.

> [W]e believe it is clear at least that the heightened intermediate scrutiny standard articulated in *Nollan* and *Dolan* does not apply in this case. Rather, the standard of review for generally applicable rent control laws must be at least as deferential as for generally applicable zoning laws and other legislative land use controls. Thus, the party challenging rent control must show "that it constitutes an arbitrary regulation of property rights."

Santa Monica Beach, Ltd. v. Superior Court, 19 Cal. 4th 952, 967, 81 Cal. Rptr. 2d 93, 102, 968 P.2d 993, 1002, *cert. denied*, 119 S. Ct. 1804 (1999).[5]

More recently a California court of appeal explained the conflict between the California Supreme Court and the Ninth Circuit Court of Appeals. The court of appeal stated the obvious by recognizing that Ninth Circuit and California Supreme Court decisions regarding the scope and applicability of *Nollan* could not be reconciled.

> In this case, there is a good reason for not following the Ninth Circuit. The *Richardson* court used the *Agins-Nollan* test in striking down the Honolulu rent control ordinance. As we concluded

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[5] The California Supreme Court was not unanimous in this interpretation of the Fifth Amendment. As Justice Brown explained in dissent:

> The majority's call to deference thus rests on an unspoken and critical assumption: that property merits only an inferior level of protection. That conclusion, a historical artifact of the demise of the *Lochner* era, has no defensible constitutional provenance.

Santa Monica Beach, 19 Cal. 4th at 1026, 81 Cal. Rptr. 2d at 141, 968 P.2d at 1041 (Brown, J., dissenting).

> above, this test cannot be used to review constitutionality of rent control schemes applicable to mobilehome parks. Moreover, our Supreme Court expressly held that this test cannot be used to review the constitutionality of general rent control laws.

Montclair Parkowners Association v. City of Montclair, 76 Cal. App. 4th 784, 795, 90 Cal. Rptr. 2d 598, 605-06 (1999).

As it currently stands, the meaning and scope of the Fifth Amendment in California depends entirely upon whether a Takings Clause challenge is brought in state or federal court. Unfortunately, this situation is not unique to California. Absent guidance from this Court, lower courts will continue to struggle to define the reach and proper application of *Nollan's* essential nexus test. The court below concluded that the explicit repudiation of the "rough proportionality" test in *Del Monte Dunes* also constituted a *sub silentio* rejection of *Nollan's* essential nexus test outside the context of dedications or exactions. This cloistered view of *Nollan* is doctrinally consistent with the position taken by California state courts and at odds with the jurisprudence of the Ninth Circuit Court of Appeals. Moreover, this interpretation is at odds with the rationale of *Nollan* that the "substantial advancement" prong of *Agins* requires something more than rational basis review. This Court should grant the writ in order to resolve this conflict.

CONCLUSION

The decision below is but the latest in a long line of lower court decisions struggling to apply the regulatory takings doctrine outside of the context of dedications and exactions. Last term this Court held that *Dolan's* "rough proportionality" inquiry did not apply beyond the special context of exactions. This decision, however, left unanswered the question of whether *Nollan's* essential nexus analysis

applied to cases, such as the one at bar, where the challenge is not to a demanded dedication or exaction, but to the denial of the ability to develop property. The court below held that the "essential nexus" test was not applicable to this situation. In so holding, the court below added to the already large body of conflicting state and federal court decisions attempting to define the scope and reach of "essential nexus" test. This Court should grant the writ to clarify this important question of constitutional law and to resolve the conflict of authority among the lower courts.

DATED: March, 2000.

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(7)

No. 99-1399

IN THE

Supreme Court of the United States

BONNIE BRIAR SYNDICATE, INC.,

Petitioner,

v.

THE TOWN OF MAMARONECK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS, STATE OF NEW YORK

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The composition of the Town Board of the Town of Mamaroneck (the "Board") has changed. Valerie O'Keeffe has replaced Elaine Price as the Supervisor of the Town. Kathy O'Flinn and Paul Ryan are no longer members of the Board; Phyllis Wittner, Judith Myers, Ernest Odierna and Nancy Seligson have become members.

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STATEMENT OF THE CASE

The Town of Mamaroneck, the Board, and the individual members of the Board (collectively, "Respondents") respectfully submit this brief in opposition to the Petition For Writ of Certiorari (the "Petition") filed by Bonnie Briar Syndicate, Inc. ("Petitioner"). Petitioner seeks to overturn the judgment of the New York Court of Appeals (the "Decision") dismissing its claim that Respondents' rezoning of 430 acres as a private Recreation Zone effected an unconstitutional taking. The rezoned property consists of Petitioner's approximately 150 acres (the "Property"), on which the Bonnie Briar Country Club is situated, and the 280-acre Winged Foot Golf Club ("Winged Foot") (together, the "Golf Course Properties"). Thus, contrary to Petitioner's assertion, the Property is not the only land included within the Recreation Zone. Indeed, the Property constitutes only 35% of the area rezoned by Local Law 6.

The rezoning was the culmination of a 30-year comprehensive planning process at the local, state, and federal levels out of which three objectives emerged repeatedly with respect to the appropriate use of the Golf Course Properties: maintaining open space, preserving recreation resources and controlling flooding. *See* R701[1], 704, 707, 709, 148, 711, 713, 710-711, 150, 628. The record unequivocally demonstrates that Local Law 6 substantially advances these three Town interests, the legitimacy of which Petitioner concedes, while permitting the Property to be developed and used in the same economically viable manner as it has been for the last 70 years.

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1. "R" refers to the Record on Appeal.

The prior R-30 zoning of the Golf Course Properties permitted the development of as many as 125 and 285 residential units on the Property and on Winged Foot, respectively. Such dense development would obliterate the only remaining large open spaces in the Town, eliminate two significant recreation resources for Town and area residents, and increase flooding.

In 1993, three and one-half years into the Board's four year rezoning process, and after owning the Property for more than 70 years without attempting to develop it for residential use, Petitioner submitted an incomplete application for approval to construct either a 71-lot subdivision with an 18-hole golf course or a 130-lot subdivision that eliminated the golf course and virtually all open space on the Property. R607-608.[2] Six months later, when the Town Board adopted required findings under the State Environmental Quality Review Act, Petitioner still had not submitted a complete application. R608.

After the adoption of Local Law 6, Petitioner commenced this lawsuit alleging, among other things, that Local Law 6 effects a taking of the Property because it does not substantially advance a legitimate government interest. Notwithstanding its claim here that the Court of Appeals deprived Petitioner of its opportunity for a trial, Petitioner moved for partial summary judgment on this claim and

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2. There is no basis in the record for Petitioner's assertion that it had an expectation of developing the property for residential use "dating back to 1922." Petition at 1. The only evidence of such expectations submitted by Petitioner dates from 1986. R1341. With respect to the preceding 64 years, the record indicates only that the Property was used as a private golf club pursuant to a lease voluntarily entered into by Petitioner. *Id.*

Respondents cross-moved for a judgment dismissing it. The Supreme Court, Westchester County (the "Motion Court") granted Respondents' cross-motion and denied Petitioner's motion, and the Appellate Division, New York's intermediate appellate court, affirmed. Thereafter, the New York Court of Appeals affirmed the conclusion of the Appellate Division that Local Law 6 does not effect a taking of the Property because it substantially advances legitimate Town interests.

Petitioner's claim that Local Law 6 effects a taking of the Property because it deprives Petitioner of substantially all of the economic value of the Property was not addressed in the initial cross-motions for summary judgment. Subsequently Respondents moved separately for summary judgment dismissing this claim on the ground that Petitioner's own appraisal indicated that the rezoning resulted in a decrease in the value of the Property of only 33%, R1291, and even with the rezoning, the Property generated a rate of return of 7.2%, thus outperforming by a wide margin similar properties in the general market area, R1292-1293. The Motion Court denied Respondents' motion on the ground that there existed unspecified "material and triable issues of fact. . . ." R1103-1104. The Appellate Division reversed, holding that Petitioner's own appraisal demonstrated that the Property was "capable of earning a reasonable return and was not deprived of 'all but a bare residue' of value." R1411. Petitioners did not appeal that determination to the Court of Appeals and, therefore, it cannot be brought before this Court.

REASONS FOR DENYING THE WRIT

I.

THE COURT SHOULD DENY THE WRIT BECAUSE LOCAL LAW 6 DOES NOT UNFAIRLY SINGLE OUT PETITIONER TO BEAR THE BURDEN OF SOLVING A COMMUNITY-WIDE PROBLEM

In Point I, Petitioner argues that this Court should grant certiorari because Local Law 6 impermissibly singles out Petitioner to bear the burden of providing public benefits, rather than alleviating problems that residential development of the Property would create. *See* Petition at 14. This argument is meritless for three reasons.

First, Petitioner's "singling out" argument confuses a policy underlying the Takings Clause with the legal rule expressing that policy. The Takings Clause evolved, in part, "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. . . ." *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978). Although that rationale is part of the conceptual underpinning of the takings doctrine, it is not, as Petitioner suggests, an independent test for determining the constitutionality of a town's zoning ordinances.

Although concerns about proportionality, such as those advanced by Petitioner, "animate the Takings Clause," this Court has not elevated that concern to a test of constitutionality beyond the special context of development-related exactions. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S. Ct. 1624, 1635 (1999). Rather, a

generally applicable zoning regulation not involving exactions, such as Local Law 6, "does not effect a taking if [1] it 'substantially advance[s] legitimate state interests' and [2] does not 'den[y] an owner economically viable use of his land.' " *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987) (*quoting Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)). A zoning ordinance that meets this legal standard is constitutional. It does not unfairly single out affected property owners because the second prong of the *Agins* test ensures that affected property owners do not suffer too great an economic loss.

Second, Petitioner's "singling out" argument is contradicted by the facts — the Property is not the only private property included in the Recreation Zone. To the contrary, all large privately-owned open spaces in the Town are included in the Recreation Zone. Of the approximately 430 acres in the Recreation Zone, only 149 — approximately 35% — are owned by Petitioner.

A zoning regulation does not effect a taking simply because it imposes burdens on a small number of parcels. "[Z]oning laws often affect some property owners more severely than others but have not been held to be invalid on that account." *Penn Central*, 438 U.S. at 133-34. As long as the regulation treats similarly situated parcels the same and substantially advances a legitimate government interest, the regulation does not effect a taking because only a few parcels are affected. *See id.* at 133-34; *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1022-23 & 1071-73 (1992) (Stevens, J. dissenting).[3] Indeed, this Court has rejected

3. *See also Pennell v. City of San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., dissenting) ("Traditional land-use regulation (short of

(Cont'd)

takings challenges to regulations that "uniquely burdened" only one or two parcels. *See, e.g.*, *Penn Central*, 438 U.S. at 133 (*citing Hadacheck v. Sebastian*, 239 U.S. 394 (1915)) (ordinance prohibiting operation of only two brickyards within a district encompassing three miles did not effect a taking).[4] Because Local Law 6 applies to all large privately held open spaces lying wholly within the Town and substantially advances the Town's legitimate governmental interests, it does not unfairly force Petitioner to bear public burdens.

Third, Petitioner's complaint — that the Court of Appeals improperly rejected its contention that Local Law 6 impermissibly singles it out to bear the burden of providing a community-wide benefit — is nothing more than a disagreement with the Court's exercise of judgment as to that issue on a particular set of facts. The argument does not present an issue of wide applicability with significance beyond the context of this case. Such a narrowly circumscribed mixed issue of law and fact does not merit the Court's review. *See* Supreme Court Rule 10.

(Cont'd)
that which totally destroys the economic value of property) does not violate [the principle against forcing some alone to bear public burdens] because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy.")

4. Although the validity of the regulation upheld in *Hadacheck* has been explained in terms of its prevention of a nuisance, in *Lucas* the Court explained that " '[h]armful or noxious use' . . . was . . . simply the progenitor of our more contemporary statements that 'land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests. . . .' " 505 U.S. at 1023-1024 (citations omitted).

II.

THIS IS NOT AN APPROPRIATE CASE IN WHICH TO CLARIFY THE TAKINGS STANDARD BECAUSE LOCAL LAW 6 PASSES CONSTITUTIONAL MUSTER UNDER ANY STANDARD

In Point II, Petitioner argues that the Court should grant the Writ because the first prong of the *Agins* test — that a taking occurs if a regulation fails to "substantially advance legitimate state interests" — is in urgent need of explication. *See* Petition at 17. Because New York appellate courts have held that Local Law 6 satisfies that standard, no matter how stringently it is construed, this is not an appropriate case for the Court to provide such guidance.

The Court of Appeals rejected Petitioner's argument that in determining whether a zoning regulation effects a taking, a court must determine whether there is an "essential nexus" between the legitimate governmental interest that the regulation was enacted to serve and the means chosen to achieve those ends. Instead, the Court of Appeals read this Court's opinion in *Del Monte Dunes* as limiting the applicability of *Nollan*'s heightened scrutiny to regulatory takings cases involving exactions and reaffirming the continued viability of the *Agins* standard outside that special context. *See* Appendix at 8-11.[5] Applying that standard, the

5. Petitioner's attempt to paint the Decision as an unexplained doctrinal change that deprived Petitioner of its reasonable expectation concerning the applicability of the "close nexus" requirement to Local Law 6, Petition, n.24, should be rejected. As the Court of Appeals explained, this Court's 1999 decision in *Del Monte Dunes* settled "considerable disagreement" on the subject among the judges of the Court of Appeals, the judiciary generally, and scholars. Appendix at 8.

Court held that "Local Law 6 easily qualifies as a valid regulatory denial of development pursuant to a generally applicable zoning law." Appendix at 11.

There is no genuine issue about whether Local Law 6 substantially advances each of the interests that it was enacted to achieve — maintaining open space, preserving area recreation opportunities, and avoiding increased flooding — and Petitioner has conceded the legitimacy of each of those governmental interests.

A. Open Space

Local Law 6 was enacted, in part, to maintain open space, which provides physical relief from development, reduces the adverse effects of over-building, preserves the suburban character of the Town, and sustains the Town's natural resources, including wildlife. *See* R142; R227. The Recreation Zone substantially advances these ends by prohibiting the dense residential development (single family homes on 30,000 square foot lots) permitted under the prior R-30 zoning.

It is undisputed that under R-30 zoning construction of as many as 125 dwelling units on the Property and as many as 285 units on the 280-acre Winged Foot Property would be possible. R631; R669-70. In addition, the residential zoning classification permitted destruction of all of the Golf Course Properties' open spaces to accommodate such development. *See* R631-32; R669-70; R157.

At no time during this litigation did Petitioner dispute the Town's analysis of the negative impacts of R-30 zoning on open space. Instead, Petitioner argues in the Petition, as

it did below, that it never considered such development, but rather intended to develop "71 clustered homes, leaving the bulk of the land devoted to the existing recreational use." Petition at 5,14. In fact, however, Petitioner applied for approval and expressed willingness to build a 130-unit residential subdivision that would have obliterated the golf course and preserved virtually no open space. *See* R1026-27; R1028-29.

Moreover, even if Petitioner's proposed subdivision in fact would have preserved some meaningful open space on the Property (which the record demonstrates it would not), the R-30 zoning that Petitioner prefers would not, and could not, ensure that result, since there is no requirement that open space (or even the appearance of open space) be preserved under R-30 zoning. Thus, R-30 zoning would leave the 430 acres subject to it (65% of which Petitioner has no control over) vulnerable to the type of development by Petitioner or environmentally insensitive transferees that would jeopardize the Town's open space goals. *See* R192-98; R631; R633; R639; R718.

Because R-30 zoning permits development incompatible with the Town's goal of preserving meaningful open space, while the Recreation Zone prohibits such incompatible use and permits uses that will preserve open space, Local Law 6 advances the Town's interests.[6] No closer causal relationship could be imagined.

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6. The Recreation Zone does not require that the Property remain "open and undeveloped," as Petitioner would have the Court believe. Petition at 4. Indeed, the Property is not undeveloped. For more than 70 years it has been developed as a commercial recreational facility, and Local Law 6 permits the Property to remain in its current commercial recreational use or to be redeveloped for other similar uses.

B. Recreational Opportunities

The Court of Appeals correctly determined that Local Law 6 also substantially advances the Town's interest in preserving recreational opportunities for area residents.[7] The only principal uses permitted by Local Law 6 are commercial recreation facilities, including golf, tennis and swim clubs, and other similar uses. R227-28. Public playgrounds and parks are also permitted by special permit. R228. Since recreation is the exclusive permitted use in the Recreation Zone, while the principal permitted R-30 use was single-family dwellings, Local Law 6 substantially advances the Town's goal of preserving recreation facilities and opportunities for Town and area residents.[8]

C. Avoiding Increased Flooding

Finally, Local Law 6 substantially advances another legitimate Town interest — avoiding increased flooding. The Town is situated on a steep incline at the bottom of an almost

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7. At the time of the rezoning, 70% of Bonnie Briar's membership resided within a five mile radius of the club. R144.

8. Petitioner suggests that Local Law 6 does not accomplish the Town's recreation goals because "the golf course was private and open to members only." Petition at 4. "The assumption that, because property is designated for private recreational use, it lacks public value and that its subsequent withdrawal has no public impact is flawed as a matter of logic." *Ehrlich v. City of Culver City, et al.*, 12 Cal. 4th 854, 878-79, 911 P.2d 429, 445 (Cal.), *cert. denied*, 519 U.S. 929 (1996). The opportunity for area residents to use the Golf Course Properties is a public benefit because it enlarges the availability of recreational facilities. *See id.* "Without such . . . facilit[ies], residents would have to travel farther, wait longer, and put up with other inconveniences and restricted choices in their recreational pursuits." 12 Cal. 4th at 879, 911 P.2d at 445-46.

fully developed watershed. *See* R628. Consequently, it is vulnerable to flooding from upstream land uses, which are outside the Town's control. It is undisputed that "substantial flooding and sewerage backup in homes is common during periods of heavy rain." *See, e.g.*, R627. Because of their location, the Golf Course Properties act as natural detention basins for the Sheldrake River, curtailing the frequency and extent of flooding in these homes. *See* R628.[9]

Local Law 6's coverage restrictions severely limit the amount of impervious surface that may be constructed on the Golf Course Properties. Any residential development of the Golf Course Properties would increase flooding in Town homes. *See* R442 and R456. Because Local Law 6 prohibits such development, it substantially advances the Town's goal of avoiding development that would increase flooding in the Town.[10]

* * * *

Even if this Court were to disagree with the degree of causal connection required by the Court of Appeals in determining whether Local Law 6 effects a taking, it should

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9. Petitioner's assertion that the Property functions as a "catch basin for waters diverted from elsewhere in the Town", Petition at i, is simply untrue. Due to the area's topography, water naturally flows to the Golf Course Properties; it is not diverted there by artificial means.

10. Petitioner's argument that Local Law 6 is not necessary to protect the Town from increased flooding because the existing regulatory scheme prohibits increases in runoff from new developments is nothing more than a variant of its argument, addressed in Point III below, that Local Law 6 is not necessary to the effectuation of the Town's goals.

deny the Writ nonetheless because there has already been a judicial determination by an appellate court that Local Law 6 survives more stringent scrutiny. Applying *Nollan*'s "essential nexus" requirement, the New York Supreme Court, Appellate Division held that Local Law 6 does not effect a taking because it accomplishes precisely the legitimate government objectives that it was enacted to advance. *See* Appendix at 15. Thus, the Court's clarification of the appropriate legal standard, even if it differs from that adopted by the Court of Appeals, would not assist in resolving this case. The facts of this case do not provide a satisfactory context in which to explicate the appropriate legal standard, because, as demonstrated above, Local Law 6 satisfies any conceivable standard.

III.

THE COURT SHOULD DENY THE WRIT BECAUSE THERE IS NO LEAST RESTRICTIVE ALTERNATIVE REQUIREMENT IN ZONING

In Point III, Petitioner asserts that the Decision conflicts with other court decisions by holding that Local Law 6 substantially advances the Town's goals because it bears a "reasonable relationship" to those goals. *See* Petition at 22. Petitioner contends that this holding is contrary to *Penn Central*, which, it asserts, requires that a zoning regulation must be "necessary" to the accomplishment of a municipality's goal in order to satisfy the first prong of the *Agins* test. There is no such conflict, however, because Petitioner misreads *Penn Central* and tries to establish a least restrictive alternative requirement that is contrary to this Court's decisions and the very essence of zoning.

Petitioner's argument that this Court has adopted a so-called "necessity requirement" in assessing regulatory takings claims is premised solely on *dicta* in *Penn Central*. *See* Petition at 22 (citing 438 U.S. at 127). In discussing the earlier case of *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), the Court stated in *dicta* that "[i]t is, of course, implicit in *Goldblatt* that a use restriction on real property *may* constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose." *Penn Central*, 438 U.S. at 104 (emphasis added).[11] The Court did not make "necessity" a required part of a regulatory takings analysis. Rather, the Court held that the regulation at issue, New York City's Landmark's Law, did not effect a taking because "[t]he restrictions imposed are substantially related to the promotion of the general welfare. . . ." Moreover, in its land use regulatory takings cases since *Penn Central*, the Court has not interpreted this language to mean that, in order to pass constitutional muster, a zoning change must be the *only* way to achieve its stated goals.[12] Accordingly, Petitioner's reliance on *Penn Central* is misplaced.[13]

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11. The court's *dicta* is, in any event, equivocal: it does not imply that a lack of "reasonable necessity" *ipso facto* or automatically or invariably constitutes a taking, only that it might.

12. Indeed, in *Nollan*, the Court made clear that *Penn Central*'s "reasonably necessary" language is merely another formulation of the *Agins* "substantially advance" test. *See Nollan*, 483 U.S. at 843 n.1

13. Petitioner's reliance on *Penn Central* is misplaced for the additional reason that it ignores the modifier "reasonably", which precedes the word "necessary." A regulation "reasonably necessary" to the accomplishment of a goal may be one of a number of ways of achieving it, while a regulation "necessary" to the accomplishment of the goal is an indispensable means of achieving it.

Moreover, Petitioner's argument that Local Law 6 is not necessary to achieve the Town's goals misdirects the inquiry. It focuses the Court's analysis exclusively upon a comparison between the new zoning district and one of an infinite number of alternatives in the array of R-30 development possibilities that ostensibly is most consistent with the goals of the rezoning and least restricts Petitioner's use of the Property — the 71-unit R-30 cluster development contemplated in one of Petitioner's proposed subdivision plans. Petitioner suggests that Local Law 6 substantially advances the Town's interests only if the rezoning is more protective than that subdivision plan because otherwise it would be superfluous in achieving the Town's goals.[14] Petitioner's argument is wrong for four reasons.

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14. Although Petitioner argued below that this determination could be made as a matter of law on its summary judgment motion, in this Court it now contends that such a determination can be made only after an evidentiary hearing. *See* Petition at 24. As explained in Point IV below, having moved for summary judgment and having failed to request such a hearing on the issue of whether Local Law 6 substantially advances the Town's interests, Petitioner cannot now argue that a hearing is required.

Also unsupported by the record is Petitioner's further contention that an evidentiary hearing is "critical" in light of the "sudden and dramatic destruction of [Petitioner's] distinct investment-backed expectations" resulting from the enactment of Local Law 6. Whether Petitioner had reasonable investment-backed expectations of residential development is a factual question not reached by the courts below, because the Appellate Division held that Local Law 6, as a matter of law, did not deprive Petitioner of economically viable use of the Property. Appendix at 13-14. Petitioner did not appeal that determination to the Court of Appeals. Moreover, during discovery Petitioner was unable to produce any proof of its original investment in the Property in 1922, let alone establish a reasonable investment-backed expectation of developing the Property for residential use dating back to 1922, as it now alleges. R1134, 1150.

First, both this Court and the New York Court of Appeals have explicitly rejected the suggestion that courts must undertake a least restrictive alternative analysis in assessing whether legislation effects a taking. *See Keystone Bituminous Coal Ass'n v. DeBenedictus*, 480 U.S. 470, 488 n.16 (1987) ("[w]e do not suggest that courts . . . are to undertake 'least restrictive alternative' analysis" in determining whether a regulation effects a taking); *Northern Westchester Prof'l Park Assocs. v. Town of Bedford*, 60 N.Y.2d 492, 501, 470 N.Y.S.2d 350, 355 (1980) ("the fact that the property would have a much greater value if zoned for less restrictive use . . . is not enough"). Thus, there is simply no basis for importing a least restrictive alternative requirement into the *Agins* test.

Second, a least restrictive alternative requirement is inappropriate because it attempts to collapse the second prong of the *Agins* test into the first prong. It rests on the premise that, even if zoning legislation substantially advances a legitimate government interest, it may nonetheless be invalid if it diminishes the value of the zoned property. This premise is clearly wrong as a matter of law and is an attempt to circumvent the stringent requirements of the second prong of the *Agins* standard. A zoning regulation that substantially advances a legitimate governmental interest does not effect a taking unless it deprives the owner of economically viable use of the land. *See, e.g., Lucas*, 505 U.S. at 1016; *Keystone Bituminous Coal Ass'n*, 480 U.S. at 495; *Agins*, 447 U.S. at 260. Petitioner's own appraisal establishes beyond question that Local Law 6 is not confiscatory. R.1411.[15]

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15. As explained above, the Appellate Division held that Petitioner's own appraisal demonstrated that Local Law 6 does not deprive Petitioner of the economically viable use of the Property. Petitioner did not appeal that determination to the Court of Appeals. (Cont'd)

Third, a least restrictive alternative requirement conflicts with the essence of zoning. The primary goal of zoning "is to provide for the development of a balanced, cohesive community which will make efficient use of the Town's available land." *Gernatt Asphalt Products, Inc. v. Town of Sardinia*, 87 N.Y.2d 668, 683, 642 N.Y.S.2d 164, 173 (1996). Thus, it is well-settled that a landowner has no vested right to the existing zoning of its property where, as here, the Town Board has rationally exercised its police power and determined that a change in zoning is required for the well-being of the community. *See id.*, 87 N.Y.2d at 684, 642 N.Y.S.2d at 174.

The zoning power requires the legislature to divide the community into use and bulk districts that create and maintain a land use pattern that benefits the community as a whole. In so doing, the legislature must balance the benefits and burdens of such classifications generally, but it need not, and indeed cannot, consider the benefits and burdens imposed by such classifications on each individual property owner. The precision urged by Petitioner is neither necessary nor possible in the proper exercise of the zoning power. *See Keystone Bituminous Coal Ass'n.*, 480 U.S. at 487 n.16 ("[t]hat a land use regulation may be somewhat overinclusive or underinclusive is, of course, no justification for rejecting it") (citing *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 388-89 (1926) (upholding constitutionality of zoning classification prohibiting innocuous as well as offensive industrial uses from district)); *Sproles v. Binford*,

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(Cont'd)

Appendix at 6; Petition at n.5. Thus, Petitioner's least restrictive alternative argument is, in this respect, an attempt to smuggle into the Petition economic considerations that were not before the Court of Appeals and, therefore, are not before this Court.

286 U.S. 374, 388 (1932) ("To make scientific precision a criterion of constitutional power would be to subject the state to an intolerable supervision hostile to the basic principles of our government. . . .").

Evaluating a generally applicable zoning regulation in the manner suggested by Petitioner would reverse these well-settled rules. Requiring that the *Agins* standard be applied to zoning restrictions like Local Law 6 by determining separately for each affected property whether the approved rezoning is the least burdensome way of achieving the legislation's objectives would prevent a municipality from zoning in the best interests of the community. It would be required instead to zone in the best interests of each individual landowner.[16] This would change radically the nature of the zoning power and, as a practical matter, give landowners vested rights to existing zoning.

Moreover, if each property owner were entitled to the zoning classification that least restricts the use of its property, courts would be in the position of second-guessing legislators on quintessentially legislative matters. *See Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 188-189 (1979) (Blackmun, J., concurring) ("A judge would be unimaginative indeed if he could not come up with something . . . a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down."). Such analysis would interfere with the democratic process by transferring the ultimate authority over land use policy from elected bodies to judges and juries.

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16. This would amount to impermissible spot-zoning. *See Rodgers v. Village of Tarrytown*, 302 N.Y 115, 124 (1951) (relevant inquiry in determining whether classification constitutes illegal "spot zoning" is whether "it was accomplished for the benefit of individual owners rather than pursuant to a comprehensive plan for the general welfare of the community").

Fourth, in evaluating Local Law 6's prohibition of certain of the uses permitted under the prior zoning, courts cannot be forced to consider only how the present owner says it would use the land. Neither the present owner nor any future owners of either of the Golf Course Properties is bound by such a statement of intentions; indeed in this case Petitioner submitted, simultaneously with its allegedly preferred plan, an alternative subdivision plan that would have obliterated open space and recreation use of the Property. Since a zoning ordinance "in the very nature of things has reference to land rather than to owner," *Vernon Park Realty v. City of Mount Vernon*, 307 N.Y. 493, 500 (1954) (citation omitted), a municipality is obligated to select the zoning classification that will ensure the fulfillment of the its goals, regardless of the identity of the owner, now or in the future. In order to determine whether the challenged zoning "substantially advances" the Town's goals, courts must look beyond a single possible development scenario and the stated intentions of present owners and consider the full range of uses permitted under the prior zoning that the challenged zoning prohibits.

The Court of Appeals properly rejected Petitioner's unprecedented and conceptually flawed argument for application of least restrictive alternative analysis. Accordingly, that issue does not merit this Court's review.

IV.

BECAUSE PETITIONER FAILED TO IDENTIFY A SINGLE MATERIAL FACT IN DISPUTE CONCERNING THE VALIDITY OF LOCAL LAW 6, THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND DEL MONTE DUNES ON THE ISSUE OF WHETHER A TAKINGS CLAIM CAN BE DECIDED AS A MATTER OF LAW

In Point IV, Petitioner argues that because the Court of Appeals held as a matter of law that Local Law 6 substantially advances legitimate Town interests, rather than requiring a trial on unspecified disputed facts, the Decision conflicts with the procedure purportedly approved by this Court in *Del Monte Dunes*, which permits a property owner to submit proof at trial. Petition at 27-28. This argument should be rejected because it is based on a complete misapprehension of the record and the procedural history of this case.

Petitioner asserts, without citation to the Record, that the facts concerning the validity of Local Law 6 are "in dispute." Petition at 28. This is simply not true. In fact, Petitioner moved for summary judgment on the question of whether Local Law 6 substantially advances legitimate Town interests, R.22-23, and submitted the Affirmation of Stuart R. Shamberg, its counsel, stating that "there exist no triable issues of material fact regarding the terms of Local Law No. 6, its purposes and effects, and that the objectives thereof are already addressed and protected under other, less onerous state and local regulations." R31. In opposing the Town's subsequently filed cross-motion for summary judgment, R605, Petitioner renewed its request for summary judgment and failed to allege a single disputed fact precluding the grant of summary judgment in favor of the Town. *See* R849; *see generally* R848-983.

Thus, the Court of Appeals did not, as Petitioner contends, "refuse[] to permit Bonnie Briar to produce evidence on the lack of necessity" for Local Law 6, Petition at 29. Rather, Petitioner never sought such permission. Instead, it maintained throughout the proceedings below that there were no material facts in dispute concerning the validity of Local Law 6 and it has identified none here. Where, as here, the facts are not in dispute, summary disposition as a matter of law is appropriate. Even Petitioner agrees. Petition at 28. Accordingly, there is no conflict between the Decision and *Del Monte Dunes* warranting this Court's review.

CONCLUSION

The Court should deny the Writ because, as the Court of Appeals correctly determined, Local Law 6 does not effect a taking of the Property, and the issues raised in the Petition do not merit this Court's review.

Respectfully submitted,

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No. 99-1399

In The

Supreme Court of the United States

BONNIE BRIAR SYNDICATE, INC.,

Petitioner,

vs.

THE TOWN OF MAMARONECK, THE TOWN BOARD OF THE TOWN OF MAMARONECK, ELAINE PRICE, Supervisor, KATHY O'FLINN, PAUL RYAN, VALERIE O'KEEFE, and BARRY WEPRIN, as Members of The Town Board,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals State Of New York

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INTRODUCTION

The brief filed by the Town, the Town Board, and the Board's Members (collectively, the Town) begs, rather than answers, the questions presented for review. They do this, not the least, by trying to camouflage the New York Court of Appeals' important constitutional adjudication with an avalanche of irrelevant factual minutiae that have no bearing on the holding below.

First, by repeatedly asserting that its new zoning law passed the test of "substantially advancing legitimate state interests" (e.g., pp. 1, 7, 8, 12), the Town evades the threshold question of *what standards* govern that test. The point made by Petitioner Bonnie Briar is that there are *no standards*. Thus, to say that the New York courts upheld the Town's actions based on this amorphous, standardless test proves only that there is a serious need for this Court to grant certiorari to determine *how* lower courts should approach this problem.

Second, by urging that Bonnie Briar cannot argue that it was "singled out" because one other property was also rezoned by this same law (e.g., pp. 1, 5), the Town evades settled decisions of this and other courts that constitutionally preclude foisting community burdens on a limited number of individuals – i.e., that "singling out" a group of two rather than one does not make the practice respectable – or constitutional.[1] For example, the Court of

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[1] As this Court noted recently in *Village of Willowbrook v. Olech*, ___ U.S. ___, 2000 WL 201157 (2000), whether a municipality singles out a class of one or five for constitutionally inappropriate treatment is irrelevant. The constitution protects all points on the spectrum.

Appeals for the Federal Circuit stated the dispositive issue thus:

> "In short, has the Government acted in a responsible way, limiting the constraints on property ownership to those necessary to achieve the public purpose, and not allocating to *some number of individuals, less than all,* a burden that should be borne by all?" (*Florida Rock Indus., Inc. v. United States,* 18 F.3d 1560, 1571 [Fed. Cir. 1994]; emphasis added.)

Third, by putting into Bonnie Briar's mouth the specious argument that municipalities must adopt some sort of "least restrictive alternative" requirement (pp. 12-18), the Town ignores Bonnie Briar's actual argument (that regulations must be reasonably necessary to accomplish municipal goals) and seeks to avoid analyzing its regulations in light of *City of Monterey v. Del Monte Dunes,* 119 S. Ct. 1624 (1999). In *Del Monte Dunes,* this Court subjected municipal zoning to the test of reasonable necessity, holding that this is a question for the trial court to determine *on the evidence* – just the opposite of what occurred below.

Finally, the Town's reliance on Bonnie Briar's summary judgment motion is disingenuous. Certainly, as the Town quotes (p. 19), Bonnie Briar believed that – on the facts that were not in dispute – the Town's rezoning could be held to *fail* the test of "substantially advancing a legitimate state interest" because the prohibition of housing was not necessary to achieve it. And if the state courts had agreed with Bonnie Briar, they could have so held. However, when those courts decided not to invalidate the Town's action as a matter of law, then the record clearly

disclosed an evidentiary conflict on the question of whether the Town's action – in the words of *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978) – was reasonably necessary to effectuate the Town's goals. The Town had evidence it believed showed the propriety of its actions. Bonnie Briar had evidence that showed the same goals could be achieved without eliminating the ability to build *any* homes on this property. That conflict – as in *Del Monte Dunes* – could not be resolved without trial.

Certiorari is amply warranted. Nothing in the Town's brief gainsays that.

I.

IT IS UNCONSTITUTIONAL TO "SINGLE OUT" AN INDIVIDUAL PROPERTY OWNER TO SOLVE A PRE-EXISTING MUNICIPAL PROBLEM. THAT IS PLAINLY WHAT HAPPENED BELOW, AND THAT IS WHY CERTIORARI IS WARRANTED.

The Town's brief concedes, as it must, that there were three problems it sought to solve by rezoning Bonnie Briar's property, *no one of which was or would have been caused by development as envisioned by Bonnie Briar.*[2] First,

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[2] The Town's repeated plaint that there would be no way to guarantee that only 71 homes would be built and that the golf course would remain (e.g., pp. 9, 18) borders on the specious – particularly for a municipality used to wielding planning and zoning powers. Nothing in this litigation would prevent the Town from zoning the property in such a way that the ability to cluster 71 homes as designed by Bonnie Briar would be the only residential use permitted. Nor would the Town be constrained

the Town sought to preserve the only remaining open space in the vicinity, because others had already developed the rest of the land. Second, it sought to preserve recreational opportunities, because the development of the rest of the Town's land by others had left no other venues. And third, it sought to press Bonnie Briar's property into service as a municipal "catch basin" to protect the rest of its residents from flooding by collecting storm waters there. (E.g., p. 1.)[3]

The Town's twofold response is unavailing.

First, the Town misconstrues the "singling out" concept, conveniently redefining it as the "proportionality" concept discussed in *Del Monte Dunes*. (p. 4.) But, although the Town may feel that such definitional sleight-

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from conditioning development permission on such a limitation. Nor would it prevent zoning the other golf course property in such a restrictive way. None of these issues was ever presented below. The Town's attorney is pulling this Court's leg.

[3] The Town appears to have misunderstood – and, at the same time, reinforced – Bonnie Briar's argument about the use of its property as a catch basin. The Town says that the water diverted onto Bonnie Briar's property "naturally flows" there, and is "not diverted there by artificial means." (p. 11, n. 9.) The means by which the water arrives are irrelevant. The point was – and remains – that the Town uses this property for municipal purposes to protect other residents from storm water. Such protection is the Town's duty, and it shouldn't be able to compel Bonnie Briar to provide a public use that benefits the entire community without just compensation. As this Court put it in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), the public acquires only those rights in land that it pays for. The rights of the public in a flood control catch basin, the same as those in a public street, are limited to those it has paid for.

of-hand lightens its argument load, it is not sufficient to meet the issue. Bonnie Briar is not urging that there is something "unproportional" about this zoning, but that its property has been *de facto* commandeered to solve municipal problems that it did not – and would not – create. As shown in the Petition, that is constitutionally impermissible.

Second, the Town insists that if two properties were conscripted into such public service, then one could not say that Bonnie Briar has been "singled" out. (p. 5.) This simplistic argument has been answered by the courts many times, as noted in the *Florida Rock* opinion quoted above. Where something is designed to benefit all members of society, then all should pay, not one or two land owners who have nothing to do with the municipal problems the Town is trying to solve by loading the cost on their backs alone.

II.

THE BENCH AND BAR ARE CONFUSED BY THE CONCEPT OF "SUBSTANTIAL ADVANCEMENT OF A LEGITIMATE STATE INTEREST" AND THIS CASE PROVIDES A PROPER VEHICLE FOR PROVIDING GUIDANCE.

The Town does not dispute that bench, bar, and academe are confused by what this Court meant in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) and its progeny when it held that a constitutional taking occurs when a land use regulation fails to "substantially advance legitimate state interests." Nor can the Town deny that the law

– and countless parties to land use disputes, not to mention lower courts that get drawn into those disputes – would benefit greatly from clarification.

Instead, in a bit of circular reasoning, the Town says this case cannot serve as the vehicle for explanation because the lower courts held that its regulation satisfies that standard. (pp. 7 *et seq.*)

The problem with the Town's argument is obvious, no matter how many times (or in how many ways) it is repeated: because the rule is without clear standards, the fact that this particular regulation was upheld does not demonstrate the absence of need for clarity. Indeed, it demonstrates the need for review because the present state of the law gives rise to an "anything goes" approach by municipalities – and an "anything can be approved" approach by some lower courts. The most appropriate time for this Court to explain the meaning of the phrase and how it is to be used is here and now, i.e., in the context of a regulation upheld by lower courts without trial. In contrast to *Del Monte Dunes*, for example, the determination here was made as a matter of law. Thus, rather than merely determining whether there was sufficient evidence to sustain the finding of a taking, this Court is in a position to elucidate the nature of evidence required for such a finding, and the standards by which such a finding is measured.

Contrary to the Town's assertion – but because of the reasons advanced by the Town – certiorari is highly appropriate here.

III.

WHETHER THERE IS A "REASONABLE *NECESSITY*" REQUIREMENT IN TAKINGS LAW IS FOR THIS COURT – NOT THE TOWN OF MAMARONECK – TO DECIDE.

The Town says there is no constitutional requirement that land use regulations be "reasonably necessary" to the achievement of municipal goals. (p. 12, *et seq.*) This assertion contradicts what the Court plainly laid out in *Penn Central*, as discussed in the Petition at pp. 22-26. And that requirement has been consistently applied by lower courts in takings cases. In addition to the *Florida Rock* opinion quoted *ante* at p. 2, see, e.g., *Sederquist v. City of Tiburon*, 765 F.2d 756, 761 (9th Cir. 1984); *McDougal v. County of Imperial*, 942 F.2d 668, 676 (9th Cir. 1991). As the Court of Appeals put it in *Del Monte Dunes v. City of Monterey*, 95 F.3d 1422, 1430 (9th Cir. 1996), *aff'd*, 119 S. Ct. 1624 (1999), the land owner was permitted to prove that "none of the City's stated reasons for denying its application was sufficiently related to the City's legitimate interests." This Court agreed that it was proper for such a land owner to submit "evidence designed to undermine the validity of the asserted factual premises for the city's denial of the final proposal. . . . " (119 S. Ct. at 1633.) Here, Bonnie Briar was denied the opportunity to make such an evidentiary presentation.

It is quite apparent that both this Court and lower courts believe that a "necessity" analysis is an indispensable part of determining whether regulatory action substantially advances legitimate state interests. But the New York courts disagree. Certiorari is the way to establish this Court's jurisprudence as primary.

IV.

THE TOWN'S SUMMARY JUDGMENT ARGUMENT VERGES ON THE SILLY

The Town's final argument is that Bonnie Briar cannot insist on its right to a trial on the facts because Bonnie Briar moved for summary judgment. Such action, according to the Town, is a confession by Bonnie Briar that there was nothing that needed trial.

Nonsense.

The trial court could have granted summary judgment in Bonnie Briar's favor on the facts alleged by Bonnie Briar. But the converse is not true. Once Bonnie Briar's motion for summary judgment was denied, trial was called for. The record – as must be apparent from the briefing before this Court – was in conflict over the necessity of precluding housing on Bonnie Briar's property in order to achieve the Town's goals. Bonnie Briar contended below that all of the Town's objectives could have been met without denying Bonnie Briar the right to build the proposed 71 homes, while leaving the golf course intact. That the Town disagrees only raises an issue of fact and renders the Town's summary judgment motion inherently improper. That being the case, Bonnie Briar deserved no less than the opportunity afforded in *Del Monte Dunes* to demonstrate the Town's failure to fulfill its constitutional obligations.

CONCLUSION

The reasons for granting certiorari are abundant. Foremost among them is the need for this Court to lift the jurisprudential fog that obscures application of its rule that a taking occurs when a land use regulation fails to substantially advance legitimate state interests. Until this Court does so, lower courts – as demonstrated by the New York courts here – will continue to zig-zag and make up the rules on an *ad hoc* basis as they go. That is not a proper constitutional foundation for a dependable rule of law for citizens to live by.

Bonnie Briar prays that certiorari be granted.

Respectfully submitted,

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